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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN
RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL;
BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD
PERSON, CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIR-
MAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C.
COBELL, TREASURER and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/
ACCOUNTANT, *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

EDMUND W. BURKE
THOMAS H. CATALANO
BURLINGTON NORTHERN
RAILROAD COMPANY
777 Main Street
Ft. Worth, Texas 76102
MICHAEL E. WEBSTER
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P.O. Box 2529
Billings, Montana 59103
October 2, 1991

BETTY JO CHRISTIAN
Counsel of Record
CHARLES G. COLE
MARK A. MORAN
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8113
Attorneys for Petitioner



QUESTIONS PRESENTED

1. Whether, in the absence of express congressional authorization, Indian tribes lack the power to tax nonmembers with whom the tribes have no consensual relationship.

2. Whether Indian tribes lack the power to tax the rights-of-way of nonmembers engaged in interstate commerce, where the rights-of-way were granted by the federal government and any discontinuance of their use is subject to exclusive federal regulatory determination.

**PARTIES TO THE PROCEEDING BELOW
AND RULE 29.1 STATEMENT**

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern, Inc. is the parent company of petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and Northern Western
Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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On Petition for a Writ of Certiorari to the
— United States Court of Appeals
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Burlington Northern Railroad Company
("BN") respectfully prays that a writ of certiorari issue
to review the judgment and opinion of the United States
Court of Appeals for the Ninth Circuit entered on Janu-
ary 25, 1991.

OPINIONS AND ORDER BELOW

The opinion of the court of appeals is reported at 924
F.2d 899 and is reproduced in the Appendix ("App.")

at 1a to 15a.¹ The Ninth Circuit's unpublished order denying BN's petition for rehearing is reproduced at 48a to 49a. The opinion of the United States District Court for the District of Montana is reported at 701 F. Supp. 1493 and is reproduced at 16a to 47a.

JURISDICTION

The decision of the court of appeals was entered on January 25, 1991. Its order denying petitioner's timely request for rehearing and suggestion for rehearing *en banc* was filed on June 4, 1991. On August 2, 1991, Justice O'Connor entered an order granting petitioner an extension of time within which to file this petition to and including October 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES AND ORDINANCES INVOLVED

This case involves the following statutes and ordinances, relevant portions of which are set out verbatim in the Appendix:

Act of April 15, 1974, ch. 96, 18 Stat. 28 (App. at 50a) ;

Act of February 15, 1887, ch. 130, 24 Stat. 402 (App. at 51a) ;

Act of May 1, 1888, ch. 213, 25 Stat. 113 (App. at 54a) ;

XVII Ft. Peck Comprehensive Code §§ 301-324 (Utilities Tax) (1987) (App. at 57a) ;

Blackfeet Tribal Ordinance 80 (Providing for a Possessory Interest Tax) (1987) (App. at 63a).

STATEMENT OF THE CASE

In this case, BN challenges the authority of the tribes of the Blackfeet and Fort Peck Indian Reservations ("the

¹ This case began as two separate proceedings, *Burlington Northern R.R. v. The Blackfeet Tribe, et al.*, No. CV-87-120-GH, and *Burlington Northern R. Co. v. Fort Peck Tribal Executive Bd., et al.*, No. CV-87-55-GH. The district court decided the cases together, and the Ninth Circuit consolidated them on appeal.

Tribes") to impose property taxes on BN's rights-of-way across the reservations. Those rights-of-way, which were granted by the federal government nearly 100 years ago, now form a part of BN's main transcontinental rail line running across the upper Midwest to the Pacific Northwest. The courts below sustained application of the tax ordinances to BN as valid exercises of tribal sovereign power, even though no consensual relationship exists between BN and the Tribes and even though federal law prohibits BN from extending or abandoning its operations over these rights-of-way at will.

A. The Origins of BN's Rights-of-Way

Tribal lands within the Blackfeet and Fort Peck Indian Reservations are held in trust by the United States. These reservations were set aside for the use and occupancy of the Tribes in the Act of May 1, 1888, ch. 213, 25 Stat. 113.² That legislation ratified an agreement negotiated in 1886 and 1887 among the United States and the affected Tribes, to which neither BN's predecessor nor any other private entity was a party. Article VIII of the agreement and implementing legislation granted to the railroads (and others) rights-of-way through the reservations, subject to a Presidential determination that construction of such rights-of-way were required by the public interest.

In 1887, before the agreement creating the separate reservations was ratified, Congress granted to BN's predecessor a right-of-way through the area that would

² The lands now constituting the Blackfeet and Fort Peck Indian Reservations were originally part of a much larger area that was set aside for the use and occupancy of various tribes in the Act of April 15, 1874, ch. 96, 18 Stat. 28. *See also* Treaty of October 17, 1855, 11 Stat. 657; Executive Order of July 5, 1873, I Kappler 855; Executive Order of April 13, 1875, I Kappler 856. In 1886 and 1887, the tribes ceded vast areas of unoccupied land and retained separate reservations on the populated lands surrounding the Fort Peck, Fort Belknap, and Blackfeet Indian Agencies. *See* H.R. Rep. No. 3487, 49th Cong., 2d Sess. 1 (1886).

become the Fort Peck Reservation. Act of February 15, 1887, ch. 130, 24 Stat. 402. In 1890, subsequent to ratification, President Harrison approved an application of BN's predecessor for a right-of-way through the Blackfeet Reservation.

B. The Tribal Taxes Imposed Against BN

Although BN has operated lines across Indian reservations for over 100 years, until 1987 no tribe had ever attempted to impose property taxes on any of its rights-of-way. According to tribal officials, the Fort Peck and Blackfeet taxes at issue here were assessed in 1987 to meet budget shortfalls.³ The Tribes did not, however, impose broadbased taxes applicable to all persons and property within the reservations. Instead, they chose to limit the taxes so that they effectively would fall only on non-members of the Tribes.

The Fort Peck Tribes' "Utilities Tax" was adopted on January 27, 1987, and approved by the Area Director of the Bureau of Indian Affairs ("BIA") the next day. For purposes of the tax,

"Utility" means any publicly or privately owned railroad; communications, telegraph, telephone, electric power or transmission line; natural gas or oil pipeline; or similar system for transmitting or distributing services or commodities; but does not include roads or highways constructed or maintained by the United States, the Tribes or the State of Montana or a subdivision thereof.

XVII Ft. Peck Comprehensive Code § 301(a), App. at 57a. The tax is imposed on "utility property," which includes "all property used for utility purposes under any agreement conferring rights to use or possess trust land on the Reservation, other than an agreement transferring full title or full beneficial title." *Id.* § 301(c), App. at 57a. For this purpose, "agreement" includes a "right-of-way . . . agreement with the United States." *Id.*

³ Affidavit of Earl Old Person ¶¶ 7-8; Affidavit of Kenneth E. Ryan ¶ 14-16, 18 (Apr. 2, 1987).

The tax rate is 3 percent of the value of the utility property, except for cooperative rural electrical or telephone associations who pay at 1 percent. *Id.* § 303, App. at 58a. The ordinance exempts the Tribes, their subdivisions, agencies, and programs, and all enterprises and entities wholly owned by the Tribes; the United States, its subdivisions, agencies, and departments; and any utility whose on-reservation utility property is valued at less than \$200,000. *Id.* § 306, App. at 60a.

The Blackfeet Tribe adopted its "Ordinance Providing for a Possessory Interest Tax" on December 30, 1986, and it was approved by the BIA Area Director on April 9, 1987. App. at 40a. "Possessory interest" is defined as "any non-exempt interest in real property within the exterior boundaries of the Blackfeet Indian Reservation," and includes land held in fee or under lease, permit, easement or right-of-way. Blackfeet Ord. 80, § 3(h), App. at 64a. The tax imposed is 4 percent of the market value of the possessory interest. *Id.* § 4, App. at 65a.

The ordinance exempts utilities that exclusively serve the reservation, governmental entities, residential property, and commercial establishments. *Id.* § 11, App. at 66a-67a. But "[u]tility lines passing through the Reservation and providing service beyond the Reservation boundaries" are expressly subject to the tax. *Id.* § 11(1), App. at 66a. "Utility" is defined to include any "entity engaged in . . . transportation services," *id.* § 3(k), App. at 65a, and BN is the largest taxpayer under the ordinance. Old Person Aff. ¶ 9.

The record includes a study commissioned by the Blackfeet Tribe and conducted by the Economics Department of the University of New Mexico, in which the Blackfeet Tribe's tax was hailed precisely because it falls upon "captive" taxpayers, such as BN:

The cost associated with moving installed pipeline, electric transmission or telephone lines *or* the cost that would be incurred from the abandonment of such facilities supports the conclusion that the Possessory

Interest Tax has considerable stability and predictability over time.

App. at 69a-70a. Another “desirable feature” of the tax, according to that study, is its “exportability”:

With few exceptions, the property that would be subject to the Possessory Interest Tax are [sic] owned by individuals and/or companies located beyond the boundaries of the Blackfeet Indian Reservation and beyond the boundaries of Pondera and Glacier Counties. To the extent that utility bills are impacted by the [tax], it is clear that most of the additional amounts paid for utility service would come from consumers located beyond the boundaries of the Blackfeet Indian Reservation

App. at 70a.

BN’s 1987 tax liability under the Fort Peck ordinance was initially assessed at \$619,571—over 40 percent of the total revenues the tribes expected to generate from the tax. BN’s liability under the Blackfeet ordinance for 1987 was initially assessed at \$531,709—also more than 40 percent of the anticipated liability for all potential taxpayers, based on projections by the University of New Mexico.

C. Proceedings Below

Before any taxes were collected under the ordinances, BN filed separate actions against the Tribes in the United States District Court for the District of Montana. In each case, BN sought an injunction against enforcement of the ordinance and a declaration that the Tribes lacked the sovereign authority to tax BN’s rights-of-way. Preliminary injunctions issued in both cases and, pursuant to court order, BN paid the disputed taxes into the registry of the court.⁴

⁴ The disputed taxes for 1987 and subsequent years were adjusted to reflect a reduction in Montana’s valuation of BN’s property and have since been placed into escrow. Based on the revised property values, BN’s annual tax liability under the two ordinances amounts to about \$640,000.

The cases were then submitted to the district court on the briefs, documentary evidence and affidavits of the parties. The district court upheld the two ordinances as legitimate exercises of the Tribes' inherent sovereign power to tax nonmembers, based exclusively on its finding that the Tribes retained a property interest in BN's rights-of-way. With respect to the Fort Peck Reservation, the court concluded that it was not clear whether Congress intended to extinguish the Tribes' property interest in the right-of-way granted to BN's predecessor in 1887. App. at 35a. The district court felt compelled to resolve that ambiguity in favor of the Tribes. *Id.* The district court also found no clear congressional intent to extinguish the Blackfoot Tribe's property interest in BN's right-of-way crossing its reservation. App. at 46a. Thus, it concluded "the territorial component essential to the valid exercise of the [Tribes'] taxing authority is satisfied." App. at 35a, 47a.

The Ninth Circuit affirmed on the basis of this Court's decisions in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). App. at 15a.⁵ It concluded that the Tribes had a "'significant interest in the subject matter' because [BN's] activities involve use of tribal lands and because [BN] is the recipient of tribal services." App. at 10a (quoting *Colville*, 447 U.S. at 153). In the court's view, a consensual relationship between BN and the Tribes was not required: "The relevant question is not whether Burlington Northern's activities on the reservation were consensual or subject to control by the Tribes but whether Burlington Northern receives benefits from the Tribes for which it may be taxed. The answer to that question is yes." App. at 11a (footnote omitted). Though the district court had made no findings on this point, the court of appeals

⁵ The court of appeals held that sovereign immunity barred suit against the Tribes and their governing bodies and dismissed them from the case. App. at 4a. However, it allowed the case to proceed against the tribal officials. App. at 5a.

concluded that “[BN] receives the intangible benefits of a civilized society . . . and the tangible benefits of police and fire protection.” App. at 10a.

REASONS FOR GRANTING THE WRIT

This case raises the issue of whether an Indian tribe can tax nonmembers with whom the tribe lacks a consensual relationship. The issue is a critical one. As budgetary demands of Tribes continue to increase, tribal governments can be expected to look beyond traditional sources of revenue to fund their operations. Many tribal taxes, like the ones upheld below, are purposely designed to impact nontribal constituencies located beyond the reservation who are powerless to protest their imposition. The scope of tribal power to tax nonmembers is therefore an issue of growing importance.

Confusion over the scope of an Indian tribe’s power to tax nonmembers is evident in decisions of the federal courts, tribal courts and councils, and the BIA. This confusion has arisen because of their failure to reconcile a series of this Court’s decisions addressing intrinsic limitations on tribal sovereignty. In several cases involving civil and criminal jurisdiction, the Court has recognized a fundamental distinction between the broad right of Indian tribes to govern their internal affairs and the right to exercise authority over external affairs, *i.e.*, their relationship with nonmembers of the tribe.⁶ The exercise of sovereignty over nonmembers has been narrowly confined: These cases have established the “general principle” that an Indian tribe’s inherent sovereign powers do not extend to relations between the tribe and nonmembers of the tribe. They recognize exceptions to this general principle only where nonmembers enter into a “consensual relationship” with the tribe or where a nonmember’s conduct imperils vital tribal interests.

⁶ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

At the same time, three cases decided in the last decade upholding a tribe's power to tax contain broad language that, when read uncritically, seem to suggest that tribal taxing authority, unlike other exercises of sovereignty over nonmembers, is presumptively valid.⁷ In fact, in all three cases, the taxes were imposed only against nonmembers who had entered into the type of "consensual relationship" recognized in other cases as a sufficient basis for the exercise of tribal authority over nonmembers.

The decision below typifies the confusion stemming from the inclination to focus on the language, rather than the actual holding, of the cases upholding a tribe's power to tax nonmembers. In upholding the taxes imposed on BN, the Ninth Circuit failed even to cite any of this Court's decisions establishing the general rule against the exercise of tribal authority over nonmembers. Moreover, the court of appeals explicitly rejected BN's contention that a consensual relationship between the railroad and the tribe was necessary before taxes could be imposed. Instead, it held that the "intangible benefits of a civilized society" and the "tangible benefits of police and fire protection" were a sufficient basis for taxing BN—even though those benefits are received by *all* non-Indians who enter reservation lands for any purpose. The court of appeals also suggested in passing that a consensual relationship could be found in the origins of BN's rights-of-way—even though BN's predecessor received them from the federal government nearly 100 years ago, and even though the Tribes lack the power to exclude BN from the reservation and BN cannot abandon its tracks or operations without federal governmental approval. A broader endorsement of the power of Indian tribes to tax nonmembers is difficult to imagine.

The decision below thus extends the taxing power of tribes over nonmembers far beyond any circumstances

⁷ See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

ever considered by this Court. By repudiating the traditional foundation of tribal taxation—the existence of a consensual relationship between the tribe and the non-member taxpayer—the Ninth Circuit has swept aside the one meaningful check on tribal power to tax nonmembers. Given the apparent lack of traditional constitutional constraints on discrimination against nonmembers, tribal taxing power over nonmembers has thus been left virtually boundless.

The implications for this nation's entire railroad industry are significant. BN's rail system, like those of many other major rail carriers, passes through numerous Indian reservations. Its tracks cannot be moved, both as a practical matter and as a matter of ICC regulation over abandonment. If the Ninth Circuit's decision stands, it will open the door to a new tier of taxes imposed on railroads by Indian tribes across the nation. As a result, the burden of tribal taxes—amounting in this case alone to at least \$640,000 per year—is likely to increase dramatically in the very near future.

Nor is the impact limited to the railroad industry. The taxes in this case apply on their face to other utilities—electrical lines, telephone and fiber optic lines, gas and oil pipelines—who are also unlikely to be in a position to remove themselves from the reservation. At least one tax also applies to land held in fee simple by non-Indians. For all of these entities, the validity of nonconsensual taxation by tribal governments in which they have no participation is of critical importance.

I. THIS CASE DEMONSTRATES THE IMPORTANCE OF CLARIFYING THE SCOPE OF AN INDIAN TRIBE'S POWER TO TAX NONMEMBERS

A. This Court's Precedent Has Been Misconstrued As Establishing the Principle that Tribes Have Broad Power to Tax Nonmembers

In a series of cases decided over the past two decades, this Court has recognized a fundamental distinction between the powers of Indian tribes over members and

nonmembers. While affirming the power of tribes to control their internal relations, these decisions establish the "general principle" that tribal sovereignty does not extend to a tribe's external relations with nonmembers. Yet, in three decisions upholding the power of tribes to tax nonmembers, this Court made no mention of this principle and employed broad language in characterizing tribal taxing power. While each of the latter three cases fits squarely within the "consensual relationship" exception to the general rule against tribal regulation of nonmembers, these tax decisions have been misconstrued in the lower courts as establishing a wholly separate principle that tribes have broad authority to tax nonmembers, whether or not a consensual relationship exists.⁸ The scope of a tribe's power to tax nonmembers thus remains in a state of confusion that only this Court can alleviate.

The basic contours of Indian sovereignty were developed early in this Court's history. In several early cases, the Court described Indian tribes as self-governing political entities that retained inherent, but diminished, sovereign powers. These decisions recognized that limitations on the sovereignty of Indian tribes derived not only from treaties or congressional enactments, but by implication as a necessary consequence of the tribes' incorporation into the United States.⁹

⁸ See, e.g., *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *Conoco, Inc. v. Shoshone & Arapahoe Tribes*, 569 F. Supp. 801 (D. Wy. 1983); *Navajo Communications Co., Inc. v. Navajo Tax Comm'n*, 18 Indian L. Rep. 6068 (Navajo May 1991); *In the Matter of Protest filed by Railbox Co., Railgon Co. & Trailer Train*, Nos. CV-87-54, 55 & 56, Pueblo of Acoma Tribal Court, (Mar. 19, 1990) *aff'd*, Pueblo of Acoma Tribal Council (Dec. 14, 1990); see also, *Atchison, Topeka & Santa Fe R.R. v. Bureau of Indian Affairs*, 14 IBIA 46 (1986).

⁹ See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (tribes lack the inherent power freely to alienate their land to non-Indians); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (tribes cannot enter into diplomatic or commercial relations with foreign nations).

In the first modern case squarely to address the measure of sovereignty Indian tribes possess over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that tribes lack criminal jurisdiction over non-Indians absent express delegation from Congress. The Court emphasized that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'" *Id.* at 208 (citation omitted) (emphasis in original).

In *United States v. Wheeler*, 435 U.S. 313 (1978), by contrast, the Court reaffirmed that an Indian tribe retains jurisdiction over crimes committed by its own members. The Court recognized a fundamental distinction between a tribe's "internal" and "external" relations, observing that "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326. This reflected "the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Id.* Powers of self-government, on the other hand, would not necessarily be divested by the tribe's dependent status since they "involve only the relations among members of [the] tribe." *Id.*

The distinction between a tribe's relations with members and nonmembers was reaffirmed in *Montana v. United States*, 450 U.S. 544, 564 (1981):

[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

The Court therefore held that the Crow tribe could not regulate nonmember hunting and fishing on reservation lands no longer owned by the tribe, since such regulation bore "no clear relationship to tribal self-government or internal relations." *Id.* The Court applied the "general

proposition," derived from *Oliphant*, that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565 (footnote omitted).¹⁰ *Montana* thus made explicit what *Oliphant* and *Wheeler* had implied: a tribe generally may not exercise authority over nonmembers.

The Court in *Montana* identified only two exceptions to this general principle. First, "[a] tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members." *Id.* In addition, in some circumstances a tribe may retain the authority to regulate conduct of nonmembers that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* Absent a showing that one of these exceptions applies, a tribe's exercise of authority over nonmembers cannot survive absent "express congressional delegation." *Id.* at 564.

The principle that tribes generally may not regulate the activities of nonmembers received the unequivocal endorsement of the Court in two recent cases. In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, a plurality of the Court relied on the "general principle" recognized in *Montana* in holding that the Yakima Nation lacked the power to zone nonmember lands in the reservation's "open" area. 492 U.S. 408, 426 (1989). Similarly, in *Duro v. Reina*, 110 S. Ct. 2053 (1990), rendered after the Ninth Circuit's decision in this case, the Court reaffirmed the general rule against tribal regulation of nonmembers in holding that tribes lack criminal jurisdiction not only over non-Indians, but over all Indians who are nonmembers of the tribe as well.

¹⁰ As the Court noted in both *Oliphant* and *Montana*, this principle found early recognition in Justice Johnson's concurrence in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), where he stated that the Indian tribes had lost any "right of governing every person within their limits, except themselves."

Over the past decade, this Court has also upheld on three separate occasions the power of an Indian tribe to tax nonmembers. In the first of these, *Washington v. Confederated Tribes of Colville Indian Reservation*, the Court upheld a tribe's authority to tax nonmembers who voluntarily entered a reservation to purchase cigarettes, observing that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 447 U.S. 134, 152 (1980). While *Wheeler* was cited in support of this proposition, the distinction it drew between a tribe's relations with members and nonmembers went unmentioned. However, in view of the commercial dealings voluntarily entered into by the nonmember cigarette purchasers, the existence of a consensual relationship is apparent.

Two years later, *Colville* provided the primary basis for the holding in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), that a tribe had the power to impose severance taxes on nonmembers extracting tribal oil and gas from reservation lands pursuant to long-term leases with the tribe. Noting that the lessees availed themselves of the "substantial privilege of carrying on business" on the reservation" and received tribal services, *id.* at 137, a majority of the Court saw "nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government," *id.* at 138, particularly since the tax revenues were "derived from value generated on the reservation by activities involving the Tribes." *Id.* The majority opinion made no mention of *Montana's* "general proposition" that inherent tribal sovereignty does not extend to the activities of nonmembers of the tribe. Nor was *Montana* cited in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), a subsequent decision relying solely on *Merrion* to uphold

a possessory interest and business activity tax imposed on nonmembers extracting minerals from reservation lands pursuant to long-term leases with the Tribes.

These three tax cases did not discuss the principles set forth in *Oliphant*, *Wheeler*, and *Montana*, and used broad language in describing a tribe's power to tax. Yet a careful reading reveals that all three cases fit squarely within the framework established in *Montana* for analyzing inherent tribal sovereignty. In *Montana*, the Court recognized that "[a] tribe may regulate through taxation . . . the activities of nonmembers who enter *consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565 (emphasis added). In each tax case, the nonmembers held subject to tribal taxing power were on the reservation pursuant to "commercial dealing" and "leases" with the tribe—precisely the type of "consensual relationships" recognized in *Montana* as supporting the exercise of tribal taxing authority over nonmembers.

This suggested reconciliation of the two lines of cases finds substantial support in *Brendale*, where the plurality explicitly reconciled *Colville* and *Montana*, citing the former as "an example of the sort of 'consensual relationship' that might even support tribal authority over nonmembers on fee lands." *Brendale*, 492 U.S. at 427.¹¹ Moreover, in reaching its decision, the plurality retraced much of the Court's sovereignty jurisprudence (includ-

¹¹ *Montana* itself makes clear that *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), two cases cited in *Colville* as recognizing the power of tribes to tax nonmembers, also fit within the "consensual relationship" exception. See *Montana*, 450 U.S. at 565-66. The same is true of *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), and *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958) *cert. denied*, 358 U.S. 932 (1959), cited in *Colville* and *Merrion*, each of which relied on the Eighth Circuit's previous decision in *Buster v. Wright* to uphold the taxation of nonmembers leasing tribal lands for grazing.

ing *Merrion* and *Colville*) without suggesting any distinction between the principles governing the analysis of tribal taxing power and the exercise of tribal sovereignty in other regulatory contexts.

Brendale thus strongly suggests that the general rule recognized in *Montana* proscribing the exercise of tribal authority over nonmembers extends to *all* civil regulatory affairs, including tribal taxation. However, perhaps because of the lack of opinion for the court in *Brendale*, this message has not been clearly understood by any of the authorities responsible for reviewing tribal taxing power—federal courts, tribal courts and councils, or the BIA. As a result, the misconception persists that a tribe's power to tax nonmembers, unlike the exercise of tribal authority in other contexts, does not require a consensual relationship. This case presents the opportunity to remedy that misunderstanding, and to clarify as well what must be shown to establish a "consensual" relationship sufficient to permit tribal regulation of nonmembers.¹²

¹² This case also provides an ideal vehicle for clarifying a second question left open in *Brendale*, namely, what role a tribe's "power to exclude" plays in evaluating the limits on tribal authority over nonmembers. In *Merrion*, a majority of the Court rejected the argument advanced by three dissenting justices that the power to exclude was the *sole* basis for tribal taxing authority over nonmembers. Yet in *Brendale*, the plurality concluded that since the Yakima Nation could no longer exclude nonmembers from significant portions of the reservation, the power to exclude could not serve as the source of some lesser power to regulate the activities of those nonmembers on reservation lands. 492 U.S. at 422-25. Furthermore, Justice Stevens (joined by Justice O'Connor) relied exclusively on his analysis of a tribe's power to exclude in deciding that the Yakima Nation could zone nonmembers residing in the "closed" area of the reservation, but lacked such authority in the "open" area. *Brendale*, 492 U.S. at 445 (Stevens, J., concurring).

Here, BN enjoys the *exclusive* use and occupancy of its rights-of-way, and the Tribes lack the power to exclude BN from the reservation. The Ninth Circuit, relying solely on *Merrion*, found this irrelevant. App. at 11a-13a. Yet both the plurality and concurring opinions in *Brendale* suggest that it should have been a significant consideration in the court's analysis.

B. The Decision Below Exemplifies the Confusion Concerning the Scope of An Indian Tribe's Power to Tax Nonmembers

The Ninth Circuit's decision in this case exemplifies the confusion that exists concerning the scope of tribal taxing power over nonmembers. The Ninth Circuit held that Indian tribes could tax BN's rights-of-way without addressing, even in passing, the long line of this Court's decisions limiting the exercise of tribal authority over nonmembers. Indeed, neither of the opinions below contains a single citation to this Court's decisions in *Oliphant*, *Wheeler*, *Montana*, or *Brendale*.¹³

Under those decisions, absent express congressional delegation,¹⁴ the assertion of tribal sovereignty over a nonmember is permissible only if one of two exceptions applies: (1) where nonmembers have entered "consensual relationships with the tribe or its members," *Montana*, 450 U.S. at 565, or (2) where nonmember conduct within reservation boundaries imperils "the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

Consensual relationships were defined in *Montana* as "commercial dealing, contracts, leases, and other arrangements." *Id.* at 565. The only reasonable inference to draw from this illustrative list is that a consensual relationship exists when the nonmember's presence on the

¹³ Although the district court did not have the benefit of this Court's opinion in *Brendale*, that decision was explicitly brought to the attention of the court of appeals.

¹⁴ No acts of Congress have expressly delegated to the tribes the authority to tax nonmembers. The Indian Reorganization Act of 1934, which authorized Indian tribes to adopt Constitutions and enumerated specific powers that would vest therein, makes no reference whatsoever to the power to tax. *See, e.g.* 25 U.S.C. § 476 (1988). Thus, even though the tribal taxes challenged here were approved by the Area Director of the BIA, this cannot constitute the "express congressional delegation" *Montana* requires to overcome the presumption against tribal regulation of nonmembers.

reservation is the result of a direct and significant business relationship with a tribe. In this case, the record is devoid of any evidence that would support a finding that such a relationship exists between BN and the Tribes. BN operates through the reservations pursuant to federally-granted rights-of-way its predecessor obtained without seeking the consent of the Tribes. Moreover, neither BN nor the Tribes has the power to decide whether the rights-of-way should be abandoned or operations terminated. Those decisions are the exclusive province of the Interstate Commerce Commission.¹⁵ In short, BN's operations on its rights-of-way were not at the outset and are not now the product of any consensual relationship between BN and the Tribes.

Nor can the taxes imposed here possibly qualify under *Montana's* second exception. The plurality in *Brendale* significantly limited the scope of this exception, holding that it applies only where the nonmember activities affect a federally-protected interest of the tribe and the impact of those activities is "demonstrably serious and . . . imperil[s] the political integrity, the economic security, or the health and welfare of the tribe." 492 U.S. at 431. The record in this case contains no showing that BN's rights-of-way or its operations along those rights-of-way could conceivably have such deleterious effects on the Tribes.

Rather than applying this framework, the Ninth Circuit assessed the validity of the ordinances at issue solely by reference to the decisions in *Colville* and *Merrion*, cases where the taxpayer voluntarily had entered into a consensual relationship with a tribe. Misinterpreting those decisions, the court of appeals rejected BN's con-

¹⁵ See, e.g., *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (ICC power over abandonments is plenary and exclusive); *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 144 (1945) (ICC's authority over abandonments extends to operations commenced prior to enactment of statute vesting ICC with jurisdiction).

tention that a similar consensual relationship with the Tribes was required here, reasoning: "The relevant question is not whether Burlington Northern's activities on the reservation were consensual or subject to the control by the Tribes but whether Burlington Northern receives benefits from the Tribes for which it may be taxed." App. at 11a (footnote omitted). The railroad's alleged receipt of "the intangible benefits of a civilized society," and "the tangible benefits of police and fire protection," were viewed as a sufficient basis for taxation. App. at 10a.

Under this analysis it is difficult to imagine a tribal tax ever being held invalid, since *all* on-reservation activities—even those occurring on nontribal lands and involving only nonmembers of the tribe—presumably would receive such benefits. Such a rule would in effect resurrect the Ninth Circuit's reasoning in *Brendale* that a tribe's inherent sovereignty is coextensive with a local government's police power, a notion explicitly rejected by a plurality of the Court as contrary to *Montana*. See *Brendale*, 492 U.S. at 429.

The court of appeals observed in a footnote that even "[i]f a consensual relationship was necessary, the Tribes consented to railroad rights of way by joining in Article VIII of the agreement ratified by the Act of 1888 and Burlington Northern chose to run rail lines through the reservations by voluntarily applying for rights of way." App. at 11a n.7. The suggestion that two parties have a consensual relationship because over 100 years ago their predecessors contracted independently with the same third party is, to say the least, a strange notion of "consent." By the Ninth Circuit's reasoning, a nonmember property owner whose predecessor-in-interest had homesteaded, under federal law, a tract of land ceded by a tribe to the United States would have a "consensual relationship" with the tribe merely because the homesteaded land had once belonged to Indians. Such a conclusion not only runs

counter to common sense, but was explicitly rejected by the plurality in *Brendale* as well. 492 U.S. at 428.

As a practical matter, therefore, the decision below divorces a tribe's taxing power entirely from its historical foundation—the existence of a consensual relationship between the nonmember taxpayer and the tribe. The court of appeals reached this result largely in reliance on a superficial reading of this Court's decisions in *Colville* and *Merrion* that failed to take into account their actual holdings.

The Ninth Circuit quoted *Colville* for the proposition that “[t]ribes retain the authority ‘to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter.’” App. at 10a (quoting *Colville*, 447 U.S. at 153). Though this rather general statement was not the holding in *Colville*, it became the lodestar for the Ninth Circuit's analysis. The court of appeals focused initially on whether the Tribes retained any property interest in BN's rights-of-way.¹⁶ App. at 9a-10a. Concluding that they did, the only question remaining was whether the Tribes had a “significant interest in the subject matter [taxed].” App. at 10a.

The court of appeals found the significant interest requirement met in part because “Burlington's activities

¹⁶ As BN argued in the court below, the Tribes have never had any property interest in its rights-of-ways that would justify the taxes imposed here. The Tribes do not currently have and have never had the power to exclude BN from reservation lands. Moreover, whether the railroad's interest is viewed as a “limited fee,” as was the case for the first half of this century, (see *Rio Grande W. R.R. v. Stringham*, 239 U.S. 44 (1915)), or as an “easement,” as more recent decisions have held (see *Great N. R.R. v. United States*, 315 U.S. 262 (1942)), it plainly includes the right to “exclusive use and possession” for so long as the railroad continues its operations. See *Wyoming v. Udall*, 379 F.2d 635 (10th Cir.) cert. denied, 389 U.S. 985 (1967); *Idaho v. Oregon S. L. R.R.*, 617 F. Supp. 207 (D. Idaho 1985). Since the Tribes also have no more than a beneficial interest in trust lands, it is difficult to see how their interest can justify a tax on the railroad's separate and exclusive interest.

involve use of tribal lands." *Id.* By equating "activities [that] involve use of tribal lands," with a "significant interest," however, the court of appeals' analysis reduces to mere tautology: a tribe can tax "the activities . . . of non-Indians taking place . . . on Indian lands," in those cases where "activities involve use of tribal lands." *Id.* This reasoning renders the "significant interest" inquiry completely meaningless and, in the process, reaches a result that finds no support in the *Colville* decision.

The Ninth Circuit also found the requisite "significant interest" in petitioner's purported receipt of tribal services. App. at 10a. Here too, however, the Ninth Circuit ignored the circumstances under which the receipt of tribal services was found to support tribal taxation in *Colville* and *Merrion*. In each case, this Court recognized that "the tribe's interest in levying taxes on nonmembers to raise 'revenues for essential governmental programs . . . is strongest when the revenues are derived from *value generated on the reservation by activities involving the Tribes* and when the taxpayer is the recipient of tribal services.'" *Merrion*, 455 U.S. at 138 (emphasis added) (quoting *Colville*, 447 U.S. at 156-157). And, in each case, the tribes were involved as partners in commercial ventures generating value on the reservation. "Under these circumstances, there [was] nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government." *Merrion*, 455 U.S. at 138 (footnote omitted). Here, in contrast, BN merely conducts a segment of its interstate transportation operations through the reservations on rights-of-way granted by the federal government for just such use a century ago. BN's operations do not "involve the Tribes" merely by virtue of the Tribes' beneficial ownership in reservation lands.

By misconstruing *Colville* and *Merrion*, the Ninth Circuit has endorsed a view of tribal taxing authority fundamentally at odds with the limited concept of Indian sovereignty over nonmembers recognized in *Montana* and

affirmed in *Brendale*. The Ninth Circuit's failure to evaluate the taxes imposed on petitioner within the framework established in *Montana* has created a precedent that effectively expands tribal taxing power over nonmembers well beyond that sanctioned in the prior decisions of this Court. Contrary to *Montana* and *Brendale*, the decision below creates a virtually irrebuttable presumption *in favor of* tribal taxation of nonmembers. Moreover, by holding that a consensual relationship is not a prerequisite to tribal taxation of nonmembers, the court of appeals has swept aside perhaps the only meaningful limitation on the exercise of such authority.

II. THE DECISION IN THIS CASE HAS NATION-WIDE IMPLICATIONS

A. The Decision Below Will Encourage Indian Tribes to Impose Discriminatory Taxes Against Nonmembers

By rejecting the contention that a consensual relationship is necessary before a tribe can impose taxes against nonmembers, the Ninth Circuit has eliminated a critical restraint on tribal authority, and in the process, opened the door to virtually unlimited tribal taxation. This Court has recently observed,

[w]ith respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country . . . This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.

Duro, 110 S. Ct. at 2064 (citations omitted).

The need for some form of consent is particularly apparent with respect to tribal taxation of nonmembers. The insight that inspired the founding of our Republic was that taxes would be fair only if imposed by the elected representatives of the taxpayers. State and local governments are precluded from imposing taxes paid ex-

clusively or predominantly by nonvoting citizens of other jurisdictions by both the Equal Protection Clause of the Fourteenth Amendment¹⁷ and the anti-discrimination principles of the Interstate Commerce Clause.¹⁸

Indian tribes do not face the same constraints with regard to the taxing of nonmembers. As the Court has recognized, for example, tribes are effectively unconstrained by the equal protection components of the Fifth and Fourteenth Amendments, which limit the discriminatory exercise of federal and state authority.¹⁹ Similarly, this Court's decision in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), renders uncertain the viability of any Commerce Clause limitations on tribal regulation of nonmembers. In the absence of such fundamental protections, grounding tribal regulation of nonmembers in a consensual relationship provides perhaps the only real measure of restraint on tribal taxing power.

A consensual relationship not only legitimizes the exercise of tribal power in that tribal authority "rests on consent," *Duro*, 110 S.Ct. at 2064, but also provides practical limitations on the unduly burdensome exercise of that power. A nonmember who is considering whether to enter into a consensual relationship with a tribe can make a calculation as to whether the potential burdens of taxation are outweighed by the economic benefits of the transaction. If tribal taxes are perceived as too high,

¹⁷ See, e.g., *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985).

¹⁸ See, e.g., *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).

¹⁹ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 & n.7 (1978); *Duro*, 110 S.Ct. at 2064. While Congress has extended certain provisions of the Fourteenth Amendment to tribal governments through the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1988), the decision in *Santa Clara Pueblo* foreclosed their enforcement except in tribal court.

nonmembers will choose not to do business with the tribe—a disincentive to excessive taxation of nonmembers. Such a choice is, however, unavailable to a nonmember who, like petitioner, has no consensual relationship with the tribe, gained the right to enter reservation lands from the federal government nearly 100 years ago, and may not of its own volition cease transporting interstate commerce through the reservation.

The need for a requirement of consent with regard to taxation is especially critical at this juncture in the evolution of tribal economic development. Internal demands for tribal revenue have increased dramatically in recent years. As a result, tribal governments increasingly are relying on taxation to raise revenues. Effectively unchecked by Commerce Clause or Equal Protection limitations, there is a great temptation for tribes to impose taxes directed only at nonmembers of the tribe, who are powerless to protest their imposition through participation in tribal government. The taxes imposed against BN in this case exemplify this dangerous trend.

The Blackfeet Possessory Interest Tax, for example, though broadly drafted to encompass any interest in real property within the reservation boundaries, app. at 64a, conspicuously exempts all residential and commercial property, governmental entities, and utilities that exclusively serve the reservation. App. at 66a-67a. Virtually the only property the tax does not exempt consists of “[u]tility lines passing through the reservation and providing service beyond the Reservation boundaries.” App. at 66a. This, of course, was precisely the point. As a study of the proposed tax commissioned by the Blackfeet Tribe observed: “[w]ith few exceptions the property that would be subject to the Possessory Interest Tax are owned by individuals and/or companies located beyond the boundaries of the Blackfeet Indian Reservation.” App. at 70a.

The Fort Peck "Utilities Tax" shares this attribute. Because it is addressed to utilities, it avoids burdening local tribal businesses and residential property. It expressly exempts all tribal entities and property, as well as any utility whose on-reservation property is valued at less than \$200,000. App. at 60a. In addition, the tax provides a preferential rate for cooperative utilities serving the reservation. App. at 58a. Finally, like its Black-foot counterpart, the Fort Peck tax exempts other governmental entities who, because of their position, might be able to exert some leverage with the tribe, either by imposing taxes of their own or through some other means. App. at 60a.

It is thus difficult to escape the conclusion that BN and other nontribal entities were singled out for these taxes precisely because they engage in interstate commerce passing through the reservation, have facilities that cannot readily be relocated, and have no direct say in tribal affairs. Tying tribal taxing power to the existence of a true consensual relationship offers some protection against such overt discrimination. If the decision below stands, however, even this minimal check on tribal taxing power will be lost.

B. The Decision Below Threatens to Have a Significant Adverse Impact on the Financial Condition of this Nation's Railroads

The implications of the decision below for this nation's railroad industry are significant. Rail lines, particularly in the West, pass through numerous Indian reservations. If the Ninth Circuit's decision stands, railroads will be exposed for the first time to a new layer of taxes imposed by Indian tribes. This tax burden is likely to grow substantially as additional tribes seize upon any railroad that happens to cross their reservations as a convenient revenue source. The result will be yet another impediment to the efforts—fully endorsed by Congress—to revitalize the economic well-being of the nation's rail system.

Some measure of the scope of the potential impact of tribal taxation on the railroad industry can be gained by reviewing the situation faced by just a few of the large interstate rail carriers. Petitioner BN, for example, which provides rail service in 22 states, has rights-of-way crossing 27 separate Indian reservations. In addition to the tax liability imposed by the Blackfeet and Fort Peck Tribes, BN is already facing additional taxation pursuant to an ordinance recently passed by the Crow Tribe, once that ordinance is submitted and approved by the BIA.²⁰

Nor is BN alone. The Atchison, Topeka & Santa Fe Railway is currently subject to possessory interest or general business taxes imposed by seven different reservations.²¹ Similarly, the Shoshone-Bannock Tribe of the Fort Hall Reservation and the Three Affiliated Tribes of the Fort Berthold Reservation have just amended their tribal tax codes to impose on the Union Pacific Railroad and the Soo Line Railroad, respectively, possessory interest taxes similar to those imposed on petitioner in this case.²² And the Southern Pacific Railroad Company, whose severe financial difficulties have recently drawn the attention of Congress,²³ has been subjected to attempts by the Pueblo de Acoma to assess a property tax on its railcars moving through the Pueblo on the tracks of another railroad.

That the potential exists for significant tribal taxation of railroads is thus very clear: The five rail carriers

²⁰ Crow Tribe Utilities Tax Ordinance (proposed).

²¹ Challenges to these taxes in tribal forums and before the Bureau of Indian Affairs have been rejected, largely on the basis of this Court's decision in *Merrion*. See e.g., *Atchison, Topeka & Santa Fe R.R. v. Bureau of Indian Affairs*, 14 IBIA 46 (1986).

²² See Tribal Tax Code of the Shoshone-Bannock Tribes §§ 701-723 (April 1991); Tribal Tax Code of the Three Affiliated Tribes of the Fort Berthold Reservation §§ 701-722 (Dec. 1990).

²³ See 137 Cong. Rec. H2369 (daily ed. Apr. 17, 1991) (statement of Mr. Slattery).

referred to above alone cross over 56 different Indian reservations. Nor can it be seriously questioned that the liability arising from tribal taxation could be a substantial financial burden on the railroads. BN's tax bill in this case alone—currently over \$640,000 per year—represents the liability for a relatively small stretch of track running across just two Indian reservations, on which it pays state and local taxes as well.

Moreover, the manner in which the Fort Peck Tribes set their tax rate in this case provides little comfort that the level of taxation imposed on railroads will be guided by a sense of reasonableness or proportionality. By all accounts, the 3 percent tax rate was chosen simply because it would produce sufficient tax revenues to erase the Tribes' budget shortfall, evidently about \$1.3 million. Affidavit of Lawrence D. Wetsit ¶ 4; Ryan Aff. ¶¶ 17-18 (Apr. 2, 1987). It thus seems likely that as tribes determine a need for greater tax revenues in the future, they will simply increase the tax rate on BN and other railroads, rather than expanding the tax base. The decision below thus creates a blueprint for tribal taxation that could lead to additional tax liabilities for the nation's railroads surpassing tens of millions of dollars annually.

Such a result directly undermines the declared national objective of strengthening the economic viability of this country's railway system. Over the past fifteen years, Congress has expressed significant concern with the precarious financial health of U.S. railroads, and enacted comprehensive legislation designed to improve their economic condition.²⁴ By sanctioning yet another financial burden on the railroad industry, the decision below has dealt Congress's goal of rejuvenating the nation's rail system a serious setback.

²⁴ See, e.g., Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31; Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

C. The Decision Below Carries Implications for Other Interstate Carriers As Well As Owners of Fee Property Within Reservation Boundaries

The impact of the decision below is not limited to the railroad industry. The taxes in this case apply to "any privately or publicly held entity engaged in supplying, transmitting, or distributing electricity, gas, water, telephone, telegraph or other communication services, or transportation services." App. at 65a; *see also* App. at 57a. Moreover, the burden of these taxes is borne almost entirely by utilities engaged in interstate commerce, since those serving the reservation are either exempt from the tax altogether or subject to a preferential rate. App. at 66a; App. at 60a.

With respect to tribal taxation, interstate utilities—oil and gas pipelines, long distance telephone and fiber optic lines, and electric power lines—are in precisely the same "captive" position as railroads. Practical or legal limitations or both prevent them from removing themselves from the reservation, a fact whose significance was not lost on the Tribes:

The cost associated with moving installed pipeline, electric transmission or telephone lines *or* the cost that would be incurred from the abandonment of such facilities supports the conclusion that the Possessory Interest Tax has considerable stability and predictability over time.

App. at 69a-70a. Interstate utilities also pose an enticing target for taxation because "most of the additional amounts paid for utility service would come from consumers located beyond the boundaries of the Blackfeet Indian Reservation." App. at 70a. For utilities then, no less than railroads, the validity of nonconsensual taxation by tribal governments in which they have no participation is therefore of critical importance.

The Ninth Circuit's holding carries even broader implications. One of the taxes upheld below applies on its face to all possessory interests, including land held by

non-Indians in fee simple within reservation boundaries. App. at 65a. While the court of appeals did not specifically validate this aspect of the tax, its decision would appear to foreshadow such a result.²⁵

Nor is the Blackfeet tribe alone in assuming that its taxing power encompasses fee lands held by nonmembers. The Pueblo of Acoma Tribal Court, for example, has observed that "[tax] jurisdiction lies with Acoma as a government and not as a landowner."²⁶ On this rationale, the tribal court held that it would have jurisdiction to tax a railroad right-of-way even if held in fee simple by the railroad, a view endorsed by the tribal council on appeal. Similarly, the recently adopted Possessory Interest Tax of the Three Affiliated Tribes of the Fort Berthold Reservation applies to all fee simple lands within reservation boundaries.

In view of the Ninth Circuit's overwhelming importance on questions of Indian law, the confused state of the law on this issue will undoubtedly persist absent definitive guidance from this Court. Of the 280 Indian reservations in this country, 170 are located within the jurisdiction of the Ninth Circuit.²⁷ Decisions in that circuit

²⁵ Indeed, in its amicus brief in this case the Justice Department, noting the "benefits" conferred by the Tribe, argued:

Even without a direct property interest in the land underlying Burlington Northern's right of way, these services, costs, and advantages provide an independently sufficient nexus for the tribal tax in this case.

Brief of United States at 11. This reasoning, in particular, creates the prospect of taxation for farmers, ranchers and other fee simple owners.

²⁶ *In the Matter of Protest filed by Railbox Co., Railgon Co. & Trailer Train*, Nos. CV-87-54, 55 & 56, Pueblo of Acoma Tribal Court at 17 (Mar. 19, 1990) *aff'd*, Pueblo of Acoma Tribal Council (Dec. 14, 1990).

²⁷ See *The World Almanac and Book of Facts*, 394 (1991). By way of contrast, the states comprising the Eighth and Tenth Circuits contain 27 and 36 reservations, respectively. *Id.*

on issues of Indian law thus carry far greater practical significance than decisions of any other court of appeals. The substantial precedential effect of the decision below argues strongly in favor of immediate Court review.

Moreover, the court below is not alone in its confusion. Other panels of the Ninth Circuit, district courts, tribal forums and the BIA have all been inclined to apply the tax cases uncritically, viewing them as a line of precedent wholly distinct from this Court's broader sovereignty jurisprudence.²⁸ That tribal courts are also taking an expansive view of tribal power to tax nonmembers is particularly important because many tax ordinances purport to require that any challenge must be brought in the first instance in tribal courts—and only a decision of this Court expressly defining the limits of their jurisdiction to tax nonmembers can be expected to restrain their assertion of broad taxing power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

EDMUND W. BURKE

THOMAS H. CATALANO

BURLINGTON NORTHERN

RAILROAD COMPANY

777 Main Street

Ft. Worth, Texas 76102

MICHAEL E. WEBSTER

CROWLEY, HAUGHEY, HANSON,

TOOLE & DIETRICH

P.O. Box 2529

Billings, Montana 59103

October 2, 1991

BETTY JO CHRISTIAN

Counsel of Record

CHARLES G. COLE

MARK A. MORAN

SARA E. HAUPTFUEHRER

STEPTOE & JOHNSON

1330 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 429-8113

Attorneys for Petitioner

²⁸ See, e.g., cases cited *supra*, p. 14 n.7.

APPENDICES



APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 88-4428, 88-4429

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,
v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESER-
VATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACK-
FEET TAX ADMINISTRATION DIVISION; EARL OLD PER-
SON, CHAIRMAN; ARCHIE ST. GODDARD, VICE-CHAIR-
MAN; MARVIN WEATHERWAX, SECRETARY; ELOISE C.
COBELL, TREASURER,
Defendants-Appellees.

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,
v.

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION, ASSINIBOINE & SIOUX TRIBES of the
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/
ACCOUNTANT,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Montana

Argued and Submitted Jan. 8, 1990

Decided Jan. 25, 1991

As Amended March 18, 1991

Before KOELSCH, BROWNING and BEEZER, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

Burlington Northern Railroad brought suit against the Blackfeet, Assiniboine and Sioux Tribes ("Tribes"), their governing bodies and various tribal officials, seeking a declaration that the Tribes lacked sovereign power to tax Burlington Northern's on-reservation rights of way, and an injunction against the imposition of such taxes.¹ The district court denied the Tribes' motion to dismiss on the ground of sovereign immunity, but granted the Tribes' motion for summary judgment on the merits. We grant dismissal of the Tribes and the governing bodies of Tribal officials acting in their official capacities as immune from suit. We affirm the grant of summary judgment.

I

In late 1886 and early 1887, the United States and the Tribes entered into an agreement creating the Blackfeet, Fort Peck and Fort Belknap Reservations, substantially as they are today. This agreement was ratified and codified by Congress on May 1, 1888, 25 Stat. 113 ("Act of 1888"). Article VIII of the agreement, incorporated in the statute, provides:

It is further agreed that, whenever in the opinion of the President the public interests require the

¹ Burlington Northern originally brought two suits: one against the Blackfeet Tribe and the other against the Assiniboine and Sioux Tribes. The district court decided the cases together (*see Burlington N. R.R. v. Fort Peck Tribal Executive Bd.*, 701 F.Supp. 1493 (D. Mont.1988)) and we consolidate them on appeal.

construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe, the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

Art. VIII, 25 Stat. at 115-16.

The parties agree that in 1887, after the agreement was signed but before its ratification, Congress granted Burlington Northern's predecessor-in-interest right of way through what would become the Fort Peck Reservation, occupied by the Assiniboine and Sioux Tribes. *See* Act of February 15, 1887, 24 Stat. 402 ("Act of 1887"). Pursuant to § 4 of the Act, the Secretary of the Interior fixed the terms and conditions of the right of way and the railroad paid the required compensation. The parties further inform us that in 1980 [sic] Burlington Northern's predecessor was granted a similar right of way across the Blackfeet Reservation.

In late 1986 the Blackfeet Tribe imposed a tax on all non-exempt possessory interests within the boundaries of the Blackfeet Reservation. In early 1987 the Assiniboine and the Sioux Tribes imposed a tax on all non-exempt utility property within the boundaries of the Fort Peck Reservation. Both taxes were approved by the Secretary of the Interior in 1987. Both apply by their terms to Burlington Northern's rights of way. Burlington Northern challenges both.

II

The Tribes contend this suit is barred by the Tribes' sovereign immunity.² We decide this issue *de novo*. *See*

² The Tribes also contend the suit should be dismissed for failure to exhaust tribal and administrative remedies. Although the Tribes

Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir.1989).

Indian tribes and their governing bodies possess common-law immunity from suit. They may not be sued absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by the tribe or abrogation of tribal immunity by Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1676-77, 56 L.Ed.2d 106 (1978). Neither exception applies here.³

failed to cross-appeal from the district court's denial of their motion to dismiss on these grounds, they may "urge on appeal, without taking a cross-appeal, any matter on the record to support the judgment rendered below." *United States v. 101.80 Acres of Land*, 716 F.2d 714, 727 n. 24 (9th Cir.1983). Burlington Northern's failure to exhaust is not a bar to jurisdiction, see *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8, 107 S.Ct. 971, 976 n. 8, 94 L.Ed.2d 10 (1987), and the district court did not abuse its discretion by reaching the merits. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1229 (9th Cir.1989) (prudential exhaustion subject to abuse of discretion standard). The complaint presents issues of federal, not tribal, law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues. Cf. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857, 105 S.Ct. 2447, 2454, 85 L.Ed.2d 818 (1985).

³ The Tribes are immune from suit even though the complaints allege the Tribes acted beyond their authority, *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985), and even though Burlington Northern seeks only "affirmative" relief. See, e.g., *Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677 ("Nothing on the face of [the Indian Civil Rights Act] purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985) (suit for declaratory and injunctive relief, as well as damages, barred by tribal immunity); see also *Chemehuevi*, 757 F.2d at 1052 n. 6 ("[tribal] sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation").

But sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-57 n. 6, 98 S.Ct. 988, 993-94 n. 6, 55 L.Ed.2d 179 (1978); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 690 & n. 22, 69 S.Ct. 1457, 1461 & n. 22, 93 L.Ed. 1628 (1949); *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed. 714 (1908). No reason has been suggested for not applying this rule to tribal officials, and the Supreme Court suggested its applicability in *Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677. We strongly implied, without deciding, that *Ex parte Young* does apply to tribal officials in *Chemehuevi Indian Tribe v. Calif. Bd. of Equalization*, 757 F.2d 1047, 1051-52 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) and *California v. Harvier*, 700 F.2d 1217, 1218-20, 1220 n. 1 (9th Cir.1983). We now reach the issue, and conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. *Harvier*, 700 F.2d at 1221, 1224 (Norris, J., dissenting). Accordingly, tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect. *Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984); *Wisconsin v. Baker*, 698 F.2d 1323, 1332-33 (7th Cir.1983).

The Assiniboine and Sioux Tribes concede this. The Blackfeet Tribe contends their officials are not amenable to suit, relying on *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir.1986), and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). But *Yakima* and *Hardin* hold only that tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their *valid* authority. See *Larson v. Domestic & Foreign Commerce*

Corp., 337 U.S. at 695, 69 S.Ct. at 1464 (“if the actions of an officer do not conflict with the terms of his *valid* statutory authority, then they are the actions of the sovereign [which] . . . cannot be enjoined or directed”) (emphasis added); accord *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir.1983); *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir.1982).⁴

III

We turn to the merits. “[T]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 901, 71 L.Ed.2d 21 (1982) (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10 (1980)). Burlington Northern contends the Tribes lacked the power to impose the challenged taxes because: (A) the rights of way are not on trust lands, (B) Burlington Northern’s activities within the boundaries of the reservations do not significantly involve the Tribes, and (C) the Tribes have been divested of their sovereign power to tax. We address each contention in turn.

A

The Acts of 1874 and 1888 set aside reservation lands for the “use and occupation” of the Tribes. Burlington Northern argues this phrase limits the Tribes’ rights to those directly related to use and occupation of the land,

⁴ *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-73, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977), in contrast, involved a suit against tribal officials based on their rights and obligations as individuals.

and this interest is not sufficient to support the right to tax. As the Supreme Court has long held, however, "the right of occupancy with all its beneficial incidents [is] . . . as sacred as the fee." *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115, 58 S.Ct. 794, 797, 82 L.Ed. 1213 (1938); accord *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345, 62 S.Ct. 248, 251, 86 L.Ed. 260 (1941); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 745, 9 L.Ed. 283 (1835). Although the United States technically "owns" reservation lands, holding them in trust for the Tribes, see, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S.Ct. 1698, 1707, 104 L.Ed.2d 209 (1989), the Tribes retain "beneficial ownership." See *Shoshone Tribe*, 304 U.S. at 116-18, 58 S.Ct. at 797-98. The Tribes' interest includes all rights normally associated with "fee simple absolute title," *id.* at 117, 58 S.Ct. at 798, and may be diminished only by clear expression of congressional intent. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48, 105 S.Ct. 1245, 1258-59, 84 L.Ed.2d 169 (1985).

No intent to transfer the Tribes' interest in the land except as necessary for use as a right of way is reflected in the grants to Burlington Northern.⁵ As earlier noted, the right of way across the Blackfeet and Fort Peck Reservations was granted by Congress in the Act of 1887. As Burlington Northern itself urges, the language of the Act of 1887⁶ is substantially similar to that found

⁵ Burlington Northern argues that an easement for construction and operation of a railroad was necessarily exclusive, and therefore precluded any use and occupancy remaining in the Tribes. This is equivalent to the argument rejected in *Merrion*, 455 U.S. at 137, 102 S.Ct. at 901, that the Tribes' power to tax derives solely from the power to exclude. The grant of an exclusive easement did not extinguish the Tribes' title. *United States v. Soldana*, 246 U.S. 530, 532-33, 38 S.Ct. 357, 358, 62 L.Ed. 870 (1918).

⁶ The Act of 1887 provides:

[Sec. 1.] . . . That the right of way is hereby granted, as hereinafter set forth, to [Burlington Northern's predecessor-in-inter-

in the Act of March 3, 1875, 18 Stat. 482, which granted railroads rights of way across public lands other than lands within Indian reservations. The Supreme Court has held the latter act "clearly grants only an easement, and not a fee," *Great N. Ry. v. United States*, 315 U.S. 262, 271, 62 S.Ct. 529, 532, 86 L.Ed. 836 (1942)—conveying no "more than a right of passage." *Id.* at 275, 62 S.Ct. at 534. The reasons upon which the Supreme Court relied apply equally to the Act of 1887. The Act of 1887, like the Act of 1875, granted, "'the,' not a, 'right of way.'" *Id.* at 271, 62 S.Ct. at 532. The Act of 1887 speaks of a right of way passing "*across*" the reservations; the Act of 1875 spoke of rights of way as passing "*over*" public land. *Id.* at 271-72, 62 S.Ct. at 532-33. The Act of 1887, like the Act of 1875, was enacted in a period in which public policy had shifted against "out-right grants of public lands to private railroad companies." *Id.* at 274, 62 S.Ct. at 534. Burlington Northern's argument that the grant in the Act of 1887 was "*in praesenti*" and therefore vested immediately is not persuasive; the issue is not when the grant vested, but

est], for the extension of its railroad through [what is now the Blackfeet and Fort Peck Reservations].

. . . .

Sec. 4. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until . . . the compensation aforesaid has been fixed and paid . . . and the . . . operation of such railroad shall be conducted . . . in accordance with such . . . regulations as the Secretary of the Interior may make . . .

Sec. 5. That the right of way across lands occupied or reserved for military purposes along the line of said railroad is hereby granted to said company the same as across said Indian reservations. . . .

rather what rights it included when it did vest. In sum, we see no reason to interpret the Act of 1887 as granting the railroads a greater interest than did the Act of 1875.

This interpretation is strengthened by Section 5 of the Act of 1887, which provides "the right of way across lands occupied or reserved for military purposes . . . is hereby granted to said company the same as across said Indian reservations." It is unlikely Congress after granting the railroads only an easement across unoccupied public lands in the Act of 1875, as the Supreme Court has held Congress did, *Great N. Ry. Co. v. United States*, 315 U.S. at 275, 62 S.Ct. at 534, would have granted the railroads a right of way in fee simple across reservation and hence military lands two years later in the Act of 1887. *Cf. id.*

Burlington Northern argues the grant of rights of way completely extinguished the Tribes' interest in the land because Burlington Northern's predecessor-in-interest was required to pay the Tribes compensation. But compensation is equally consistent with a grant of an easement or a fee, and weighs in favor of neither.

Burlington Northern argues that Congress, by the Act of 1887, had already granted Burlington Northern right of way across the reservations before Congress ratified the earlier agreements with the Tribes, by adopting the Act of 1888 establishing the reservations' boundaries. Thus, the Tribes had no property interest left in the right of way to which the Act of 1888 could apply. However, the agreement embodied in the Act of 1888 was signed by the Tribes and representatives of the United States before the Act of 1887 was passed. The language of the Act of 1887 closely tracks that of the agreement, and the legislative history clearly indicates Congress passed the Act with the agreement, and particularly Article VIII, in mind. See H.R.Rep. No. 3487, 49th Cong., 2d Sess. 2 (1886); *Burlington Northern*, 701 F.Supp. at 1501-02; *cf. Clairmont v. United States*, 225 U.S. 551, 556, 32

S.Ct. 787, 788, 56 L.Ed. 1201 (1912) (Indian tribes surrendered in writing “‘all the right, title, and interest’” in the railroad rights of way they may have had by virtue of earlier treaties). Acts of Congress will not be construed to extinguish Indian property or treaty rights unless that intent is clearly and plainly expressed. *E.g.*, *County of Oneida*, 470 U.S. at 247-48, 105 S.Ct. at 1258-59. Congress did not say it intended to abrogate the Tribes’ property interests when it passed the Act of 1887, and we are not persuaded Congress did so.

Burlington Northern’s argument that the Act of 1888 simultaneously extinguished the Tribes’ rights in the land within the right of way across the reservations while granting them to the railroad merely restates arguments we have already rejected. We find no clear expression Congress intended the Act of 1888 to extinguish the Tribes’ property interest.

The Tribes’ power to tax nonmembers derives from the Tribes’ continuing property interest. Like the continuing property interest in the leases at issue in *Merrion*, 455 U.S. at 141-42, 102 S.Ct. at 903-04, this interest was not extinguished by the right-of-way grant.

B

Tribes retain the authority “to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter.” *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 153, 100 S.Ct. at 2081. Here, the Tribes have a significant interest because Burlington’s activities involve use of tribal lands and because Burlington is the recipient of tribal services. *See id.* at 156-57, 100 S.Ct. at 2082-83. Burlington Northern receives the intangible benefits of a civilized society, *see Cotton Petroleum*, 109 S.Ct. at 1714, and the tangible benefits of police and fire protection. To permit taxation of the railroad’s property, the benefits need not “equal

the amount of [Burlington Northern's] tax obligations." *Id.*

Burlington argues the operations of the railroad may not be taxed because these operations are not based upon a consensual relationship with the Tribes and are not controlled by the Tribes but by state and federal authorities. The relevant question is not whether Burlington Northern's activities on the reservation were consensual or subject to control by the Tribes⁷ but whether Burlington Northern receives benefits from the Tribes for which it may be taxed. The answer to that question is yes.

C

If Congress has divested the tribes of authority to tax, it matters not whether the activity sought to be taxed occurs on trust lands or receives benefits from involvement with the Tribe. However, as the Supreme Court said in *Merrion*, 455 U.S. at 149, 102 S.Ct. at 908, "we reiterate here our admonition in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 98 S.Ct. 1670, 1678, 56 L.Ed.2d 106 (1978): 'a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.'"⁸

Burlington Northern contends when Congress adopted the Acts of 1887 and 1888 Congress did not intend the Tribes to have the power to tax railroads because the

⁷ If a consensual relationship was necessary, the Tribes consented to railroad rights of way by joining in Article VIII of the agreement ratified by the Act of 1888 and Burlington Northern chose to run rail lines through the reservations by voluntarily applying for rights of way.

⁸ In 1982 the Supreme Court wrote "[F]ederal law to date has not worked a divestiture of Indian taxing power." *Merrion*, 455 U.S. at 149, 102 S.Ct. at 908 (quoting *Colville Indian Reservation*, 447 U.S. at 152, 100 S.Ct. at 2080). So far as we have been informed, that statement remains true today.

Tribes were "viewed as being outside the white man's culture," Appellant's Opening Brief at 22, and "unprepared to function independently in 19th Century American life." *Id.* at 25; *see also* Reply Brief at 22-24. As the Supreme Court noted in *Merrion*, however, the Senate Judiciary Committee in a report issued in 1879 stated:

"We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government,¹⁹ they may enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life; and *they undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects*—a right not in any sense derived from the Government of the United States."

Merrion, 455 U.S. at 140, 102 S.Ct. at 903 (quoting S.Rep. No. 698, 45th Cong., 3d Sess., 1-2 (1879) (emphasis added by the Court)).

Burlington Northern also contends Congress implicitly divested the Tribes of authority to tax Northern Pacific's property by passage of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"). Indian tribes are not mentioned in the 4-R Act's comprehensive regulatory scheme or the 15-year legislative history of that Act. *See Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457, 107 S.Ct. 1855, 1857, 95 L.Ed.2d 404 (1987). Burlington Northern treats this

¹⁹ The Secretary of the Interior, through the Bureau of Indian Affairs, exercised the requisite supervisory control by approving the taxes at issue in this case.

silence as a "clear indication" that Congress intended to divest the Tribes of their authority to tax railroads. We conclude otherwise.

Congress intended the 4-R Act to end discriminatory taxation by the states, and, not surprisingly, section 11503(b) addresses only state taxation. The silence as to Indian tribes does not "clearly" indicate Congress intended to restrict tribal taxation; more likely it indicates Congress did not consider the subject. See *Merrion*, 455 U.S. at 148 n. 14, 150-52, 102 S.Ct. at 907 n. 14, 908-09.

Burlington Northern's argument that the "complex regulatory scheme" found in the 4-R Act and other federal enactments preempts the Tribes' power to *regulate* railroads is irrelevant. The Tribes have not attempted to regulate Burlington Northern; they have merely imposed a tax "to defray the cost of providing governmental services." *Merrion*, 455 U.S. at 137, 102 S.Ct. at 901.

IV

Burlington Northern contends that if the Tribes have the power to tax, the Tribal taxes imposed here violate the 4-R Act and the Commerce Clause.

A

Section 11503(b) of the 4-R Act prohibits "a State, subdivision of a State, or authority acting for a State or subdivision of a State" from imposing any "tax that discriminates against a rail carrier." 49 U.S.C. § 11503 (b) (4). By its plain language, section 11503(b) applies only to the states and subdivisions thereof. This plain language controls "in the absence of a clearly expressed legislative intent to the contrary." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. at 461, 107 S.Ct. at 1860 (internal quotations omitted).

Throughout extensive Congressional consideration of the 4-R Act only taxation by the states and their sub-

divisions was at issue. Burlington Northern does not contradict this assertion but rather argues the intent of Congress cannot be achieved unless the 4-R Act limits the taxing power of Indian tribes as well as of the states. But once again, we may not impute a meaning to a statute not clearly there when to do so would abrogate Indian rights. See *County of Oneida*, 470 U.S. at 247-48, 105 S.Ct. at 1258-59; see also F. Cohen, *Handbook of Federal Indian Law* 283 (1982 ed.) "congressional intent to override particular Indian rights [must] be clear".¹⁰ We conclude the 4-R Act does not apply to the Tribes.

B

We also reject Burlington Northern's challenge to tribal taxation under the Interstate Commerce Clause. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190-93, 109 S.Ct. 1698, 1715-16, 104 L.Ed.2d 209 (1989), the Supreme Court held the Interstate Commerce Clause does not apply to Indian tribes:

"The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct." In fact, the language of the Clause no more admits of treating Indian tribes as States than of treating foreign nations as States.

Id. (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18, 8 L.Ed. (1831)). The Court went on to say

¹⁰ *Phillips Petroleum Co. v. United States Environmental Protection Agency*, 803 F.2d 545 (10th Cir.1986), cited by appellants, is distinguishable. In that case, the court implied coverage of Indian reservations by the Safe Drinking Water Act. The statutory language contained ambiguous references to Indians, the legislative history clearly showed congressional intent to include Indian reservations, and the Tribes supported an interpretation of the statute equating Indian reservations to states. *Id.* at 555-56. The court could also infer congressional intent from Congress' 1986 amendment of the statute to specifically include Indian reservations. *Id.* at 548.

[m]ost notably, as our discusison of Cotton's "multiple taxation" argument demonstrates, the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce "among" States with mutually exclusive territorial jurisdictions to trade "with" Indian tribes. *Id.* 109 S.Ct. at 1716.

Nor is the Indian Commerce Clause applicable. The central function of that clause "is to provide Congress with plenary power to legislate in the field of Indian affairs," not to maintain free trade among the States. *Id.*

The Tribes and their legislative and executive bodies are DISMISSED on sovereign immunity grounds. The District Court's decision is AFFIRMED as to the remaining defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MONTANA
GREAT FALLS DIVISION

Nos. CV-87-055-GF, CV-87-120-GF

BURLINGTON NORTHERN RAILROAD,
Plaintiff,

v.

FORT PECK TRIBAL EXECUTIVE BOARD, FORT PECK TRIBAL
TAX COMMISSION, ASSINIBOINE and SIOUX TRIBES of the
FORT PECK INDIAN RESERVATION: KENNETH E. RYAN,
TRIBAL CHAIRMAN; and PAULA BRIEN, TRIBAL SECRE-
TARY/ACCOUNTANT,

Defendants.

BURLINGTON NORTHERN RAILROAD,
Plaintiff,

v.

BLACKFEET TRIBE OF THE BLACKFEET INDIAN NATION;
BLACKFEET TRIBAL BUSINESS COUNCIL; BLACKFEET TAX
ADMINISTRATION DIVISION; EARL OLD PERSON, CHAIR-
MAN; ARCKIE ST. GODDARD, VICE CHAIRMAN; MARVIN
WEATHERWAX, SECRETARY; and ELOISE C. COBELL,
TREASURER,

Defendants.

Nov. 23, 1988

Michael E. Webster, Bruce R. Toole, Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Mont., for plaintiff.

Harry S. Sachse, Marvin J. Sonosky, Reid Peyton Chambers, William R. Perry, Sonosky, Chambers & Sachse, Washington, D.C., Ray F. Koby, Swanberg, Koby & Swanberg, Great Falls, Mont., for Fort Peck Tribal Executive Bd., et al.

Jeanne S. Whiteing, Boulder, Colo., Phillip Roy, Donald Kittson, Browning, Mont., for Blackfeet Tribe of Blackfeet Indian Nation, et al.

MEMORANDUM OPINION

HATFIELD, District Judge.

A. THE ASSINIBOINE AND SIOUX TRIBES

The plaintiff, Burlington Northern Railroad, challenges the authority of the Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation, Montana, to impose a tax upon the right-of-way occupied by the Railroad across the Fort Peck Indian Reservation. On May 15, 1987, this court granted the Railroad's request for preliminary injunctive relief, thereby enjoining the Tribes from levying the disputed tax upon the Railroad's right-of-way. The matter is presently before the court on cross-motions for summary judgment for a determination of whether the Tribes should be permanently enjoined from attempting to levy a tax upon the Railroad's right-of-way.

I.

On January 27, 1987, the Tribal Executive Board, as governing body of the Assiniboiné and Sioux Tribes, enacted an ordinance implementing a tax known as a "utility property tax". The ordinance was designed to tax the property interests of public and private utilities using tribal trust lands on the Fort Peck Indian Reservation. In general, the tax rate is 3% of the value of the inter-

est held. The ordinance was approved by the Area Director of the Bureau of Indian Affairs on January 28, 1987. The first tax assessments under the ordinance were sent to the taxpayers on April 15, 1987, with payment due by May 15, 1987. Before any taxes were collected, the Railroad brought this action seeking to invalidate the tax as applied to that entity.

The Railroad takes the position that because the right-of-way upon which it operates was established pursuant to an act of Congress, the Tribes have been divested of their sovereign authority to impose a tax with respect to that right-of-way. In the alternative, the Railroad seeks a declaration that the ordinance is null and void, as violative of the Commerce Clause of the United States Constitution and section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub.L. 94-210, 90 Stat. 31 (49 U.S.C. § 11503). The Tribes, on the other hand, view the imposition of the tax as a legitimate exercise of their sovereign authority.

II.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), the United States Supreme Court recognized the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.*, at 137, 102 S.Ct. at 901. Referring to its earlier decision in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court reiterated that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 455 U.S. at 137, 102 S.Ct. at 901. The power of an Indian tribe to tax derives from the tribe's general authority, as sov-

ereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. 455 U.S. at 137, 102 S.Ct. at 901. Consequently, a tribe's interest in levying taxes on nonmembers is strongest when the revenues are derived from value generated on the reservation by activities involving the tribe, and when the taxpayer is the recipient of tribal services. 455 U.S. at 138, 102 S.Ct. at 902. Therefore, "a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax." 455 U.S. at 141-142, 102 S.Ct. at 903-904. The Court recognized, as evident, the fact that there exists a "significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." 455 U.S. at 142, 102 S.Ct. at 904.

The rationale expressed by the Court in *Colville*, and expounded upon in *Merrion*, requires a tribal interest in the subject matter to justify a tribal tax. See, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 433-434, n. 27. Use of trust land by a non-Indian supplies such an interest, but on fee land the interest must be based on other circumstances. *Id.*, citing, *Collins*, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479, 508-21 (1979). In those precedential cases in which the use of tribal property by non-Indians was not involved, the tribal interest sufficient to justify a tribal tax upon non-Indians emanated from the fact that the non-Indians entered the reservation for the purpose of transacting business with Indians. See, *Kerr-McGee Corporation v. Navajo Tribe of Indians*, 471 U.S. 195, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985); *Washington v. Confederated Colville Tribes*, *supra*; *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030 (1904); *Buster v. Wright*,

135 F. 947 (8th Cir.1905), *appeal dismissed*, 203 U.S. 599, 27 S.Ct. 777, 51 L.Ed. 334 (1906).

In the matter *sub judice*, the Railroad concedes, as it must, the general power of the various Indian tribes to tax the transactions of non-Indians which occur on trust lands and significantly involve a tribe or its members. The court perceives the Railroad's challenge to the contested tax to be predicated upon its conclusion that the territorial component, essential to the valid exercise of the Tribes' taxing authority, is absent with respect to the subject right-of-way. The position of the Railroad is based upon its conclusion that the right-of-way is not tribal property and that the Tribes' interest in the operation of the railroad upon that right-of-way is insufficient to justify the imposition of a tribal tax.

The Tribes on the other hand, confident the right-of-way is properly considered reservation trust land, submit the tax must be sustained as a legitimate exercise of the Tribes' inherent sovereign authority. The Tribes see no legitimate basis upon which application of the tax to the Railroad's right-of-way can be distinguished from application of the tax to any other non-Indian business holding a possessory interest on reservation land. Tribal consent, the Tribes submit, was essential to the establishment of the right-of-way. The Tribes view the right-of-way as but an easement, with beneficial title to the land over which the right-of-way crosses remaining in the Tribes. The Tribes contend the implementation of the tax is a valid exercise of their sovereign authority to control economic activity within the tribes' jurisdiction. In the opinion of the Tribes, their possessory interest tax is indistinguishable, in essence, from the tribal tax sustained by the Supreme Court in *Merrion*. The initial question to be addressed is whether Congress, in establishing the subject right-of-way, intended to extinguish the Tribes' beneficial title to the land comprising the right-of-way.

III.

Analysis must obviously begin with a review of the history pertinent to the establishment of the subject right-of-way. Pursuant to the Act of April 15, 1874, 18 Stat. 28, Congress set apart a vast area of land in that area of the western United States, which is now the State of Montana, as the "Blackfeet" reservation for the "use and occupation" of numerous Indian tribes, including the Assiniboiné and Sioux Tribes. By the Act of May 1, 1888, 25 Stat. 113, Congress established the present diminished boundaries of three Indian reservations, *i.e.*, *Fort Peck*, *Fort Belknap* and *Blackfeet*. The Act of May 1, 1888, represented the congressional ratification of, *inter alia*, a December 28 and 31, 1886, agreement between the United States and the Assiniboiné and Sioux Tribes, whereby the Tribes ceded and relinquished all their right, title, and interest in and to all lands embraced within the 1874 reservation, not specifically set apart and reserved as separate reservations for these Tribes. Between the time the 1886 Agreement was reached amongst the Assiniboiné and Sioux Tribes and the United States, and the passage of the Act of May 1, 1888, ratifying that agreement, Congress passed the Act of February 15, 1887, 24 Stat. 402, which granted the subject right-of-way to the Burlington Northern's predecessor-in-interest. The right-of-way passed through lands of the 1874 reservation which were eventually included within the boundaries of the *Fort Peck Indian Reservation* as established by the Act of May 1, 1888.¹

¹ The Act of May 1, 1888, specifically addressed the grant of rights-of-way through the newly formed reservation in Article VIII which provided:

It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, . . . through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right-of-way shall be, and is hereby granted for such purposes, under such rules, regulations, limitations, and re-

Review of the history pertinent to the establishment of the Fort Peck Indian Reservation reveals that the Tribes' property rights in the reservation were established by specific acts of Congress. The Tribes, therefore, held full beneficial fee interest in the land comprising the right-of-way, as they did to all land comprising the reservation created by the Act of April 15, 1874. See, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 477-485 (1982 ed.), and cases cited therein. As the Tribes readily recognize, however, the United States retains fee title to the land comprising all Indian reservations. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

Consistent with the "plenary power of legislation" in regard to Indian affairs, Congress may extinguish tribal interest in real property subject to the stricture of the fifth amendment to the United States Constitution requiring just compensation for deprivation of property interests. See, *Shoshone Tribe v. United States*, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937); *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). As emphasized by Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 586, 5 L.Ed. 681, (1823) "the exclusive right of the United States to "extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher v. Wetherby*, 95 U.S. 517, 525, 24 L.Ed. 440 (1877). This precise point was reiterated by the Supreme Court in *United States ex rel Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941), wherein the court stated:

strictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raised political, not justiciable, issues. *Buttz v. Northern Pacific Railroad*, 119 U.S. [55] at 66. [7 S.Ct. 100, 104, 30 L.Ed. 330].

Consequently, Congress has complete discretion to determine when to extinguish Indian title to reservation land thereby determining when the rights of a grantee to that land become possessory rights. See *United States ex rel Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. at 347, 62 S.Ct. at 252. In ascertaining whether Congress elected to extinguish Indian title, the court is mindful of the Supreme Court's caution in *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*:

But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675 [32 S.Ct. 565, 569, 56 L.Ed. 941] the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." (citations omitted)

Id. at 354, 62 S.Ct. at 255.

More recently, in *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), the Court reiterated that an intent to abrogate Indian rights would not be "lightly imputed to conceive that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying a Tribe's property rights. 391 U.S. at 413, 88 S.Ct. at 1711.

In determining whether Congress, in granting the subject right-of-way, intended to extinguish the Tribes' beneficial title to the land comprising the right-of-way, the court must examine the text of, and the legislative history attendant, the operative legislation, and consider the time and circumstances surrounding enactment of that legislation. See, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660 (1977); see also, *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984).

IV.

The Burlington Northern construes the Act of February 15, 1887, as a grant *in praesenti*, which effectively extinguished the Tribes' beneficial interest in the land comprising the right-of-way. The Tribes, however, take the position that the right-of-way granted the Burlington Northern Railroad Company's predecessor-in-interest was simply an easement. Congress did not, the Tribes argue, intend to extinguish the beneficial title held by the Tribes in the land comprising the right-of-way. Rather, the Tribes submit, the right-of-way was negotiated by the Tribes via the 1886 Agreement and simply approved by the federal government through the enactment of the Act of May 1, 1888.

The Act of February 15, 1887, provided, in specific terms: "the right-of-way is hereby granted for the extension of its railroad through the lands set apart [by the 1874 Act] for the use of the [Tribes]." Act of February-15, 1887, § 1. The grant of the right-of-way was conditioned upon, *inter alia*, the Tribes being compensated in an amount to be determined by the Secretary of the Interior. In that regard, Section 4 of the Act of February 15, 1887, provided in pertinent part:

No right of any kind shall vest in said railroad company in or to any part of the right of way herein

provided for until plats thereof, made upon actual survey for the definite location of such railroad . . . shall be filed with and approved by the Secretary of the Interior, and until the compensation aforesaid fixed by the Secretary [for the Indians] has been fixed and paid. . . .

Because the United States retained fee title to the land comprising the subject right-of-way, specific congressional authorization was necessary to effectuate the grant of the right-of-way to the Burlington Northern's predecessor in interest.² The Act of February 15, 1887, obviously accomplished that grant.³

The fact the Tribes held beneficial title to the land comprising the right-of-way would not, of course, have prevented the grant of Congress from operating to pass the right-of-way to the grantee. *See, Missouri, Kansas & Texas Railway Company v. Roberts*, 152 U.S. 114, 116-

² The Act of March 2, 1899, granted the Secretary of Interior the general authorization to grant rights-of-way for railroads through Indian reservations. Act of March 2, 1899, Chapter 374, 30 Stat. 990 (25 U.S.C. § 312). Prior to the 1899 Act railroad rights-of-way through reservations were granted piecemeal, either by treaty provision, or by special statute providing for compensation to the Secretary of the Interior for the benefit of the Indians. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, 542, n. 135 (1982 ed.).

³ The creation of the reservation in 1874 made the March 3, 1875, General Railroad Right-of-Way Act (18 Stat. 482) inapplicable. In *Great Northern Railroad Company v. United States*, 315 U.S. 262, 273-279, 62 S.Ct. 529, 533-536, 86 L.Ed. 836 (1942), the Supreme Court held, with respect to those portions of this same rail line for which the right-of-way was acquired by the railroad's predecessor-in-interest under the general right-of-way statute, Act of March 3, 1875, *see* 152, 18 Stat. 482, the Act granted "a present beneficial easement," but did not serve to convey fee title. The Tribes submit that *a fortiori*, a right-of-way grant across Indian trust lands carries no greater estate than the one over public lands. The court is unpersuaded that this simple deduction resolves the issue presented here for determination.

118, 14 S.Ct. 496, 497-498, 38 L.Ed. 377 (1894); *Buttz v. Northern Pacific Railroad*, 119 U.S. 55, 66, 7 S.Ct. 100, 104, 30 L.Ed. 330 (1886). In *Missouri, Kansas & Texas Railway Company v. Roberts*, 152 U.S. 114, 14 S.Ct. 496, 38 L.Ed. 377, the Court explained the authority of Congress in this regard:

The United States had the right to authorize the construction of the road of the Missouri, Kansas and Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the two hundred feet as a right of way to the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government; and when transferred, without reference to the possession of the lands and without designation of any use of them requiring the delivery of their possession, the transfer was subject to their right of occupancy; and the manner, time and conditions on which that right should be extinguished were matters for the determination of the government, and not for legal contestation in the courts between private parties. This doctrine is applicable generally to the rights of Indians to lands occupied by them under similar conditions. It was asserted in *Buttz v. The Northern Pacific Railroad Company*, 119 U.S. 55 [7 S.Ct. 100, 30 L.Ed. 330] and has never, so far as we are aware, been seriously controverted. In that case, the lands were within what is known as Indian country, where the right of the Indians to the occupancy of their lands was recognized; and in grants by the government of portions thereof for works of internal improvement, there usually was a stipulation for its extinguishment as rapidly as might be consistent with public policy and the welfare of the Indians. Such a stipulation was given when the grant under consideration in the case was made, showing that the government intended the

grant to take effect notwithstanding any existing right of occupancy by the Indians, and it was deemed a sufficient expression of its intention to that effect. No such stipulation was made when the grant of the right of way through the Osage reservation was made, but the uses to which the lands were to be applied necessarily involved their possession. That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration.

152 U.S. at 116-118, 14 S.Ct. at 497-498. Cognizant of this fact, the Tribes intimate that the passage of the Act of February 15, 1887, transferred the right-of-way subject to the Tribes' beneficial title. Therefore, the Tribes submit, the Burlington Northern is mistaken in its assertion that Congress intended the grant to be absolute in its terms, unencumbered by the Tribes' right of occupancy.

The Burlington Northern counters the Tribes' proposition with the suggestion that tribal assent was not a prerequisite to extinguishment of the Tribes' beneficial title. Emphasizing the fact the Act of February 15, 1887, predated the Act of May 1, 1888, by more than 14 months, the Burlington Northern asks the court to infer that Congress did not act pursuant to the Agreement of 1886 in granting the right-of-way.

The court is mindful of the fact that treaty making with Indian tribes effectively ended with passage of the Appropriations Act of March 3, 1871, Chapter 120, § 1, 16 Stat. 544, 566 (codified and carried forward at 25 U.S.C. § 71). See, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 515 (1982 ed.) (citing examples). Nonetheless, while formal treaty making was abandoned, the federal government continued to make agreements with Indian tribes for the conveyancing of tribal lands, many similar to treaties, that were approved by both houses of Congress. *Id.* at 107. Regardless of the meth-

odology employed by Congress in effectuating a grant or cession of an interest in tribal land, however, the authority of Congress to extinguish an Indian tribe's beneficial title to reservation land remains unquestioned. See *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119-123, 80 S.Ct. 543, 555-557, 4 L.Ed.2d 584 (1960); see also, *Henkel v. United States*, 237 U.S. 43, 47-50, 35 S.Ct. 536, 538-539, 59 L.Ed. 831 (1915). From the time of the enactment of the Appropriations Act of March 3, 1871, the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress. *Re Heff*, 197 U.S. 488, 498, 25 S.Ct. 506, 508, 49 L.Ed. 848 (1905) (overruled on other grounds, *United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916)). Where Congress clearly expresses its intent to extinguish an Indian tribe's beneficial title to reservation land, that legislative decision is not subject to legal contestation in the courts. *Buttz v. Northern Pacific Railroad Company*, 119 U.S. at 66, 7 S.Ct. at 104.

The legislative history attendant passage of the Act of February 15, 1887, evinces the understanding of Congress that the United States held fee title to the lands comprising the Indian reservation created by the Act of April 15, 1874, as it does to the land comprising all Indian reservations. See, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *Buttz v. Northern Pacific Railroad*, 119 U.S. at 66, 7 S.Ct. at 104.⁴ The entire history surrounding the grant

⁴ The comments offered by Senator Teller of Colorado during the Senate debates leading to the passage of the Act of February 15, 1887, poignantly address this precise point. With specific reference to the compensation provisions incorporated into the Act, Senator Teller stated:

"I have not any objection to the United States making any donations to the Indians whenever the Government of the United States sees fit. The bill shows that this is not Indian land in any sense of the term. The President of the United States reserves this land. He can tomorrow declare it to be public land again if he sees fit.

of the right-of-way further reflects that Congress was well aware of the beneficial title which the Tribes held to the lands comprising the reservation created by the 1874 Act. Specifically, in 1886 Congress established a Northwest Indian Commission to negotiate an agreement of cession with the Indians holding title to the land comprising the 1874 Act reservation. Act of May 15, 1886, c. 333, 24 Stat. 29, 44. The Commissioners appointed by the Secretary of the Interior pursuant to the Act of May

He reserves it for use of the Indians. I have not any doubt about his authority to have allowed this railroad to be built across the land without any act of Congress; but they have seen fit to come to Congress and we provide that the Secretary of the Interior shall fix a price the railroad is to pay, not to the Government, whose land it is, but to the Indians, who have no title whatever in the land. . . . Here we provide payment to Indians who are occupying a piece of ground under an executive order. The executive order gives them no rights whatever. It simply reserves the land from occupation by white men. Now we say the Indians shall be paid for this land which they do not own. It seems to me that this provision of the bill ought to be stricken out. . . ."

18 Cong.Rec., 1436-1437 (Feb. 7, 1887).

Senator Teller was referring to those portions of the affected reservation which were created by executive order. While his conclusion that the Tribes held no title whatsoever in the land comprising the reservation established by executive order would appear to be incorrect, *see, Sioux Tribe v. United States*, 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942), his comments are indicative of the fact that Congress was aware the United States held fee title to the land comprising the subject right-of-way. The report accompanying that bill, which was introduced into the House of Representatives and ultimately passed as the Act of February 15, 1887, reflects the understanding that the Indians held beneficial title to the land comprising the reservation.

Such portions [of those reservations through which the right-of-way is granted] as are covered by statute and executive orders are merely set apart for the occupancy of the Indians. The fee remains in the Government. No right to the soil is conferred. The power that set them aside can modify them. But notwithstanding this, the Bill out of abundant caution carefully provides for all of the rights of the Indians and their proper compensation.

H.R.Rep. No. 3487, 49th Cong., 2d Sess. 1436-1437 (1887).

15, 1886, negotiated an agreement with the Tribes which provided that the Assiniboiné and Sioux Tribes and other Tribes having an interest in the reservation created by the Act of 1874 did "cede and relinquish all their right, title and interest in and to all the lands embraced within [the 1874 reservation] . . . not herein specifically set apart and reserved as separate reservations for them." The 1886 Agreement further provided in Article VIII that right-of-way through the reservation was granted by the various tribes for, *inter alia*, railroads, subject to the prescriptions delineated by the Secretary of the Interior, including compensation for the affected tribe. *See*, n. 1, *supra*. As noted, the 1886 Agreement was ultimately ratified by Congress in the Act of May 1, 1888, 25 Stat. 113. The Act expressly reiterated that the reservation established by the Act of April 15, 1874, was set apart for the "use and occupancy" of various Indian tribes, including the Assiniboiné and Sioux tribes.

The entire thrust of the Tribes' argument is that tribal assent was a condition precedent to the grant of the right-of-way, since tribal assent was necessary to the extinguishment of the Tribes' beneficial title to the land comprising the right-of-way. Consistent with this premise, the Tribes expressly state that the Act of February 15, 1887, merely implemented the 1886 Agreement and must be viewed as nothing other than congressional consent to the Tribes' transfer of the right-of-way to the Burlington Northern's predecessor in interest. The Tribes support their position with inferences drawn from the fact that the congressional decision to establish the right-of-way through the entire Blackfeet Reservation created by the Act of April 15, 1874, occurred in temporal proximity with that legislation designed to diminish the Blackfeet Reservation created by the Act of April 15, 1874; dividing that reservation into three smaller separate reservations. The Tribes cite no authority in support of their assertion that tribal assent was necessary to the

establishment of the right-of-way through reservation lands to which any Indian tribe held beneficial interest.

The Act of February 15, 1887, granted right-of-way through the Blackfeet Indian Reservation as comprised by the Act of April 15, 1874, and the Fort Berthold Reservation in the northwestern Dakota Territory. Act of February 15, 1887, 24 Stat. 402, § 1. Consistent with its plenary authority to do so, Congress could have included the right to possession within its grant. Moreover, the fact Congress, in its ratification of the 1886 Agreement establishing the diminished boundaries of the Fort Peck Indian Reservation, approved that provision of the Agreement recognizing the reserved right of the federal government to use the lands of that reservation for certain public improvements, would not, in itself, serve to derogate the validity of such a grant. The determinative inquiry is whether Congress, in its enactment of the Act of February 15, 1887, intended to extinguish the Tribes' beneficial title to the land comprising the right-of-way.

It is generally recognized that in the absence of an expressed intent of Congress to the contrary, railroad land grants have not affected tribal possessory rights. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, 518 (1982 ed.), e.g., *Northern Pacific Railroad Co. v. United States*, 227 U.S. 355, 33 S.Ct. 368, 57 L.Ed. 544 (1913); *Buttz v. Northern Pacific Railroad Co.*, *supra*; *Leavenworth, L.G. & R.R. v. United States*, 92 U.S. 733, 23 L.Ed. 634 (1875). Focusing upon the legislative history attendant passage of the Act of February 15, 1887, one is inexorably compelled to conclude that Congress did not express a clear intent to extinguish the beneficial title of all Indian tribes holding such an interest to the land comprising the right-of-way. Review of the statements made by individual Senators during the debate leading to passage of the bill, specifically the comments of Senator Teller, as set forth in n. 4, *supra*, evince a desire to extinguish the Tribes' beneficial title. The colloquy

spawned by Senator Teller's comments, however, fail to unequivocally establish that Senator Teller's view was shared in total by his Senate colleagues. A review of that colloquy is instructive:

MR. DOLPH. I think this is a matter of more importance than seems to be considered by a majority of the Senate. In the first place, the Government has granted by general act the right of way over the public lands to every railroad company that chooses to comply with the provisions of the act of March 3, 1875. I judge from the letter of the Secretary of the Interior, and I so understand it, that the Government had already extinguished the Indian title to these lands before this reservation was set aside by executive order.

MR. TELLER. Certainly it had.

MR. DOLPH. Then the President comes in and sets aside a portion of the public domain for the use of the Indians as a reservation. If it had not been for that order, there is already existing legislation which would grant to the railroad company, by compliance with its conditions, a right of way over those lands.

Now, because of the executive order, and because the President does not choose to modify the executive order in-so-far as to allow the company to locate its line over this land and to file its maps and thereby secure the right of way, the company comes to Congress for leave to deal with the Indians in regard to the reservation. As I understand, there is a provision in the bill to the effect that the company shall pay the Indians for the land—which does not belong to them, but belongs to the Government—as well as to pay for the injury done to the improvements made by the Indians.

I think it is a wrong principle, and, as suggested by the Senator from Missouri [Mr. Cockrell], it might commit us to the idea, at least as a precedent,

that the Indians had a right to the soil, or the power of the President to donate land to Indians at any time. I understand the President could rescind his order at any time, and throw any one of the reservations which have been created by executive order open to settlement without any act of Congress whatever.

MR. DAWES. There is no doubt about the President's authority to vacate the order by which he established the reservation, and there is no doubt in my mind that he could permit the railroad company to go over the land by excepting from his order so much of the land as would be occupied by the railroad. But the President and those administering Indian affairs decline to do that; and they, with the railroad company and the Indians, have agreed that for the use of this right of way, while the executive order exists, the railroad company shall pay the Indians what the Secretary of the Interior says they ought to pay for the use of the land while the executive order exists. The Senate can decline to grant this right, and the Interior Department will decline to let the railroad go through, and I shall be entirely satisfied.

MR. TELLER. Has the agreement already been made between the company and the Indians?

MR. DAWES. But, it seems to me, all at once somebody is straining at a gnat and swallowing a camel. I do not know who it is, but the idea that when the railroad company is perfectly willing to pay the Indians for the use of the land just what the Secretary of the Interior agrees, and they have all three gone into the agreement, and the money is ready, then because perchance in accordance with strict law the Secretary had the power to do it without this proposed act, the Senate may decline to pass the bill if they choose.

See, 18 Cong.Rec., 1436-1437 (Feb. 7, 1887).

The statements of individual legislators are appropriately considered with other pertinent indices of legislative intent in determining the construction to be afforded a particular statute. See, *Chrysler v. Brown*, 441 U.S. 281, 361, 99 S.Ct. 1705, 1751, 60 L.Ed.2d 208 (1979). The statements of individual legislators, however, should not be given controlling effect unless they are consistent with statutory language and other legislative history which justifies reliance upon them as evidence of Congress' intent. *Grove City College v. Bell*, 465 U.S. 555, 567, 104 S.Ct. 1211, 1218, 79 L.Ed.2d 516 (1984).

In searching for the intent of Congress in the passage of the Act of May 1, 1888, the court is not limited, however, to the "lifeless words of the statute," but recognizing that the Act in question was the product of the period, the court may "with propriety refer to the history of the times when the Act was passed." *Great Northern Railway Company v. United States*, 315 U.S. 262, 273, 62 S.Ct. 529, 533, 86 L.Ed. 836 (1942) (citations omitted). In the *Great Northern* case, the Court was called upon to ascertain the nature of the rights conferred upon the Burlington Northern's predecessor in interest with respect to a right-of-way granted under authority of the Act of March 3, 1875.⁵ In resolving the question presented, the Supreme Court relied extensively upon a sharp shifting congressional policy occurring in 1871 with respect to the granting of railroad rights-of-way. See, *Great Northern Railway Company v. United States*, 315 U.S. 262, 273-276, 62 S.Ct. 529, 533-535, 86 L.Ed.2d 836 (1941). Recognizing that legislation establishing railroad right-of-way granted, in general, a more limited interest, the Court in *Great Northern* concluded that it was im-

⁵ The right-of-way of concern in the *Great Northern* case is one associated with the same rail line which utilizes the right-of-way at issue in the case at bar. The right-of-way at issue in the *Great Northern* case crossed public lands contiguous to the Blackfeet Indian Reservation as defined by the Act of May 1, 1888.

probable that Congress intended by the Act of March 3, 1875, to grant more than a right of passage. 315 U.S. at 274-275, 62 S.Ct. at 534-535.

Having assiduously reviewed the text of, and legislative history attendant, the Act of February 15, 1887, the court is compelled to conclude that the expression of Congress' intent contained therein with respect to the extinguishment of the Tribes' beneficial title to the land comprising the right-of-way is, at best, ambiguous. Consistent with compelling precedent, this doubtful expression must be resolved in favor of the Tribes. *See, Menominee Tribe v. United States*, 391 U.S. at 413, 88 S.Ct. at 1711; *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. at 354, 62 S.Ct. at 255.

Accordingly, the court finds the Tribes retain beneficial title to the land comprising the Railroad right-of-way across the Fort Peck Indian Reservation. Hence, the territorial component essential to the valid exercise of the Tribes' taxing authority is satisfied with respect to the disputed tax.

V.

Cognizant of the plenary authority of Congress to limit tribal sovereignty, and particularly a tribe's authority to tax non-members, *see, Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 141, 102 S.Ct. at 903, the court now addresses the Railroad's argument that Congress has implicitly abrogated the Tribes' authority to impose the utility tax. The Railroad generally asserts that the comprehensive regulatory scheme implemented by Congress to govern the operation of railroads in interstate commerce, evince a congressional intent to preempt taxation of railroads by Indian tribes. Tribal taxation of the Railroad's right-of-way interest, the Railroad submits, would be inconsistent with the superior interest of the United States in having a uniform system of railroad regulation. The Railroad places specific reliance upon section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub.L. 94-210,

90 Stat. 31 (49 U.S.C. § 11503), which the Railroad contends, implicitly divests the Tribes of their inherent sovereign authority to impose a tax upon the Railroad.

The arguments advanced by the Railroad are identical to those advanced by the petitioner in *Merrion* challenging the severance tax at issue in that case. Accordingly, the mode of analysis utilized by the Supreme Court in *Merrion* is appropriately followed by this court in reviewing the Railroad's argument that Congress divested the Tribes of their authority to impose the utility tax at issue. The court appropriately undertakes its review cognizant of the admonition espoused in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 98 S.Ct. 1670, 1678, 56 L.Ed.2d 106 (1978) :

The proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. The purpose of the Railroad Revitalization and Regulatory Reform Act was 'to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States.'

Section 101(a).

Among the means chosen by Congress to fulfill these objectives, particularly the goal of furthering railroad financial stability, was a prohibition on discriminatory state taxation of railroad property. *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987). Congress' solution to the problem of discriminatory state taxation of railroads was embodied in section 306 of the Act, currently codified at 49 U.S.C. § 11503. *Id.*⁶ The

⁶ Title 49 U.S.C. § 11503(b) provides in relevant part:

The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not

Act does not refer to Indian tribes and the language of the Act can hardly be construed as providing a clear indication that Congress intended to deprive the various Indian tribes of their sovereign power to tax. Accordingly, the court is constrained to find that the Federal Government has not divested the Tribes of their inherent authority to tax the Railroads' right-of-way. See, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 152, 102 S.Ct. at 909.

Contrary to the assertion of the Railroad, the situation presented is akin to that addressed by the Supreme Court in *Merrion*. Like the petitioner in *Merrion* the Railroad is unable to explain why state taxation of the same type of activity, of which the Railroad complains, escapes the asserted conflict with federal policy. 455 U.S. at 151, 102 S.Ct. at 908, citing, *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). Moreover, the court is persuaded by the Tribes' argument that the tax fosters rather than inhibits, an important national policy, i.e., promotion of Indian self-determination and economic development, see, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335, 103 S.Ct. 2378, 2387, 76 L.Ed.2d 611 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 and n. 10, 100 S.Ct. 2578, 2584 and n. 10, 65 L.Ed.2d 665 (1980); by providing a means of enabling tribal government necessary to the provision of essential government services.

do any of them: (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property. (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection. . . .

See, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137, 102 S.Ct. at 901.

VI.

Finally, the court reviews the Railroad's argument that the utility tax, as applied to the Railroad, violates the "negative implications" of the commerce clause of the United States Constitution.⁷

It is a well-established principle that a state violates the "negative implications" of the interstate commerce clause by unilaterally enacting legislation which unduly burdens or discriminates against interstate commerce. Review by federal courts is obviously appropriate where such unilateral state action is challenged, since such review insures that states do not disrupt or burden interstate commerce when the power vested in Congress by the interstate commerce clause remains unexercised. See, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 154, 102 S.Ct. at 910. Review in those instances is essential to safeguard Congress' latent power from encroachment by the several states. Federal courts may legitimately engage in this review, however, only when Congress has not acted or purported to act. *Id.*, citing, *Prudential Insurance Company v. Benjamin*, 328 U.S. 403, 421-427, 66 S.Ct. 1142, 1150-1154, 90 L.Ed. 1342 (1946). As stated by the Court in *Merrion*:

Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce,

⁷ Cognizant of the conceptual difficulty acknowledged by the Supreme Court with respect to the review of tribal action under the interstate commerce clause, and the Court's refusal to review tribal regulation of commerce under the Indian commerce clause, this court, as did the Court in *Merrion*, assumes that tribal action is subject to the limitations of the interstate commerce clause. 455 U.S. at 153-54, 102 S.Ct. at 910-11.

and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action. See *Prudential Insurance Company v. Benjamin*, *supra*, [328 U.S.] at 431 [66 S.Ct. at 1155]. Courts are final arbiters under the Commerce Clause only when Congress has not acted. See, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. [134] at 454 [99 S.Ct. 1813, 1824, 60 L.Ed. 336].

455 U.S. at 154-155, 102 S.Ct. at 910-911.

Where Congress acts pursuant to the authority vested in that body by the interstate commerce clause to approve a tax by an Indian tribe, it is not the function nor the prerogative of the federal courts to question the wisdom of that decision. See, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 156, 102 S.Ct. at 911. As the Court in *Merrion* recognized, where Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect and a challenged tax has traveled through those precise channels, judicial review of the validity of the tax under the "negative implications" of the interstate commerce clause is precluded. 455 U.S. at 155-156, 102 S.Ct. at 910-911.

The same checkpoints recognized by the Court in *Merrion* are present in the case at bar. Consistent with the requirements of the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, the Tribes obtained approval from the Secretary before they adopted the constitution announcing their intention to tax nonmembers. Further, before the ordinance imposing the tax challenged by the Railroad could take effect, the Tribes were required again to obtain approval from the Secretary. See, CONSTITUTION AND BYLAWS OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, Article VIII, section 3. Both the Tribes' constitution and the challenged tax ordinance received the requisite approval from the Secretary of the Interior. Consequently, this court is

without authority to strike down the tax as violative of the "negative implications" of the interstate commerce clause.

B. THE BLACKFEET TRIBE

The Burlington Northern Railroad challenges the authority of the Blackfeet Tribe of Indians to tax the right-of-way occupied by that entity on land crossing the Blackfeet Indian Reservation. The Railroad seeks a declaration that the Blackfeet Tribe of Indians is without authority to impose a tax upon the right-of-way held by the Railroad across lands within the boundaries of the Blackfeet Indian Reservation. On July 20, 1978, the court entered an order preliminarily enjoining the Blackfeet Tribe from levying the disputed tax upon the Railroad's right-of-way. The matter is presently before the court on cross-motions for summary judgment for a final determination of whether the Blackfeet Tribe should be permanently enjoined from attempting to levy the disputed tax.

I.

The Blackfeet Tribe of Indians is a tribe organized under a constitution and by-laws promulgated under authority of the Indian Reorganization Act of 1934 (25 U.S.C. §§ 476 *et seq.*). The Blackfeet Tribal Council, as governing body of the Blackfeet Tribe, is empowered by the Blackfeet Constitution to levy taxes upon nonmembers of the Tribe "trading or residing" within the Blackfeet Reservation. *See*, BLACKFEET CONSTITUTION, art. VI(1)(h). On December 30, 1986, the Blackfeet Tribal Council enacted a possessory interest tax ordinance which authorized taxation of any interest in real property located within the Blackfeet Reservation. The ordinance was approved by an authorized representative of the Secretary of Interior on April 9, 1987. The Blackfeet Tribe has deemed the ordinance applicable to the Railroad's right-of-way across the Blackfeet Reservation, and has

taken steps to levy the tax upon the right-of-way. The Tribe views the imposition of the tax as a legitimate exercise of its sovereign authority.

The Railroad asserts that because the right-of-way it holds over the Blackfeet Reservation was established pursuant to an act of Congress, the Blackfeet Tribe has been divested of its sovereign authority to impose a tax with respect to that right-of-way. In the alternative, the Railroad seeks a declaration that the ordinance is null and void, as violative of the commerce clause of the United States Constitution and section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub.L. 94-210, 90 Stat. 31 (49 U.S.C. § 11503).

The court need not restate the general principles of law determinative of an Indian tribe's right to impose a tax upon a nonmember, or the principles of statutory construction applicable to legislation affecting the rights of Indian tribes. The pertinent principles previously discussed by the court, in the companion case of *B.N. v. Assiniboine and Sioux Tribes of the F.P. Indian Reservation*, CV-87-055-GF (D.Mont.1988), obviously guide analysis of the issue presented here for determination. Therefore, the court turns to determine whether Congress acted to extinguish the Blackfeet Tribe's beneficial interest in the land comprising the right-of-way.

II.

The Blackfeet Reservation, as presently existing, was originally reserved to the Blackfeet Tribe by the Treaty of October 17, 1855, 11 Stat. 657. The original reservation was subsequently reduced in size and modified by various executive orders, congressional acts and agreements. See, e.g., Exec. Order of July 5, 1873; Act of April 15, 1874, 18 Stat. 28. Of these orders and acts, the one of principal importance to the present controversy is the Act of April 15, 1874, by which Congress set apart a vast area of land for the "use and occupation" of numerous Indian tribes

including the Blackfeet Tribe. By the Act of May 1, 1888, 25 Stat. 113, Congress established the present diminished boundaries of three separate reservations for the various northern Montana Indian tribes, one of which was the Blackfeet Reservation. The Blackfeet Reservation continued within its aboriginal territory and within the original reservation boundaries established in 1855 and 1874. The Act of May 1, 1888, represented the congressional ratification of agreements of land cession, executed between the United States and the various northern Montana tribes, including the Blackfeet Tribe.

Article VIII of the Act of May 1, 1888, provided that right-of-way through the reservations was granted by the various tribes for, *inter alia*, railroads; subject to the prescriptions delineated by the Secretary of the Interior, including compensation for the affected tribe.⁸ On September 29, 1890, the Burlington Northern's predecessor in interest, *i.e.*, St. Paul, Minneapolis & Manitoba Railway Company, having begun construction of its railroad through eastern Montana, applied to the Commissioner of Indian Affairs for authority to extend its line of railway through the Blackfeet Indian Reservation. On October 20, 1890, President Benjamin Harrison, pursuant to Article VIII of the Act of May 1, 1888, granted the railroad's application for right-of-way. On October 24, 1890, the Secretary of the Interior prescribed the dimensions of the right-of-way to be the same as the dimensions prescribed for the right-of-way granted by the Act of February 15, 1887, 24 Stat. 402, across portions of the Blackfeet Reservation as established by the Act of April 15, 1874.

The Railroad seeks a declaration that Congress extinguished the Blackfeet Tribe's beneficial interest to that reservation land comprising the right-of-way granted the Burlington Northern's predecessor in interest. The Blackfeet Tribe takes the position that the grant of the right-of-

⁸ See, n. 1, *supra*.

way was, in effect, negotiated and granted by the Blackfeet Tribe. Accordingly, the Blackfeet Tribe asserts that the right-of-way granted to the Burlington Northern Railroad Company's predecessor in interest was simply an easement granted by the Tribe and approved by Congress.

Analysis must begin with recognition of the fact that the Blackfeet Tribe held full beneficial fee interest in the land comprising the right-of-way. See, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 477-485 (1982 ed.), and cases cited therein.⁹ Consequently, the question presented is whether Congress acted to extinguish the Blackfeet

⁹ For purposes of the present analysis, the court considers the Blackfeet Tribe's property rights in the reservation as established by specific Acts of Congress and, therefore, subject to the just compensation requirement of the fifth amendment to the United States Constitution. See, *Shoshone Tribe v. United States*, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937); *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Without specific discussion, the Blackfeet Tribe alludes to the fact that the Blackfeet Reservation, as presently existing is part of the aboriginal territory of the Blackfeet Tribe. Regardless of whether the title held by the Blackfeet Tribe to the land comprising the right-of-way in question is considered "recognized" title held pursuant to congressional action, or "unrecognized" title based upon aboriginal title, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 486-493 (1982 ed.), the Blackfeet Tribe had the right to occupy that land. See, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574, 5 L.Ed. 681 (1823). As with recognized Indian title, the underlying fee simple title of lands to which an Indian tribe holds unrecognized title can be conveyed subject to the Indian right of occupancy. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810). Likewise, the exclusive right to extinguish original Indian title rests with Congress, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); *United States ex rel Hualpai Indians v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941), and such title will be deemed to have been extinguished only where there exists a clear and specific indication of congressional intent to abrogate that title. See, *United States ex rel Hualpai Indians v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 354, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941).

Tribe's title to the land comprising the right-of-way granted the Burlington Northern's predecessor in interest through the Blackfeet Reservation.

Whether or not the Blackfeet Tribe's beneficial title to the land was extinguished depends upon the construction to be given the act of Congress granting that right-of-way. *United States v. Soldana*, 246 U.S. 530, 531, 38 S.Ct. 357, 358, 62 L.Ed. 870 (1918). If the Blackfeet Tribe's beneficial title to that land was extinguished by the grant, the right-of-way is not within Indian country. *Id.* at 531, 38 S.Ct. at 358, citing, *Bates v. Clark*, 95 U.S. 204, 24 L.Ed. 471 (1877). The parties concede that the only statute which need be considered in determining whether the Blackfeet Tribe's beneficial interest to the land comprising the right-of-way was extinguished is the Act of May 1, 1888, 25 Stat. 113, which confirmed the establishment of the diminished boundaries of the Blackfeet Indian Reservation.

In construing the Act of May 1, 1888, from which the Railroad derives the interest it holds in the right of way across the Blackfeet Reservation, the court is not unmindful of the fact that in the absence of an expressed intent of Congress to the contrary, railroad land grants have been construed as not having affected tribal possessory rights. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 518 (1982 ed.), and cases cited as examples. Moreover, the court recognizes that the Act of May 1, 1888, was intended fully to protect Indian interests. Accordingly, it must be liberally construed in favor of the Indians, see, *Bryan v. Ataska County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); accord, *Southern Pacific Transportation Company v. Watt*, 700 F.2d 550, 552 (9th Cir.1983), with any doubtful expressions of congressional intent being resolved in favor of the Blackfeet Tribe. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973) (quoting, *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930)).

This court is further guided by the Supreme Court's decision in *United States v. Soldana*, *supra*, wherein the United States Supreme Court was called upon to determine whether a railroad right-of-way granted through the Crow Indian Reservation, pursuant to Article VIII of the same Act of May 1, 1888, was properly considered Indian country for purposes of the enforcement of criminal statutes. The Court stated:

Whether these Acts should be held to have granted a mere easement or a limited fee or some other limited interest in the land, (citations omitted); it is clear that it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right-of-way. To have accepted the strip from the reservation would have divided it into two; and would have rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to insure.

246 U.S. at 532-33, 38 S.Ct. at 358-359.

In reaching its determination, the Court in *Soldana* also considered the Act of February 12, 1889, 25 Stat. 660, which specifically granted the right-of-way through the Crow Indian Reservation. That Act provided, at section 5, that the grant of the right-of-way was upon the express condition that the grantees and successors "will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy that is hereinbefore provided: *provided*, that any violation of the condition mentioned in this section shall operate as a forfeiture of all rights and privileges of said railroad company under this Act." 246 U.S. at 532, 38 S.Ct. at 358.¹⁰

¹⁰ Without elaborating, the Court in *Soldana* stated that the case of *Clairmont v. United States*, 225 U.S. 551, 32 S.Ct. 787, 56 L.Ed.

Construing Article VIII of the Act of May 1, 1888, in accordance with the dictates of the foregoing principles of construction, and cognizant of the construction afforded this same provision by the United States Supreme Court in the factual context presented in *Soldana*, the court is compelled to conclude that it was not the purpose of Congress to extinguish the Blackfeet Tribe of Indians' beneficial title to the land comprising the right-of-way.

The Burlington Northern fails to present a cogent argument which persuades the court that the right-of-way granted its predecessor in interest across the Blackfeet Reservation should be viewed differently than the right-of-way for the same railroad line granted by Congress across public land. Absent a clearly expressed congressional intent to extinguish the Blackfeet Tribe's beneficial title to the land comprising the right-of-way, this court would be remiss to impute that intent to Congress. See, *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705,

1201 (1912), was factually distinct since *Clairmont* "involved a statute which extinguished the Indian title." 246 U.S. at 530, 38 S.Ct. at 357. The issue presented for resolution in the *Clairmont* case was whether the land comprising a railroad right-of-way held by the Northern Pacific Railroad Company across the Flathead Indian Reservation, Montana, was property considered "Indian country" for the purpose of applying certain federal criminal statutes. The preliminary question resolved was whether Congress acted to extinguish the Indian title to the land comprising the right-of-way. 225 U.S. at 556, 32 S.Ct. at 788. The Court held that by the Act of July 2, 1864, 13 Stat. 365, Congress granted the railroad company fee title to the land constituting the right-of-way. 225 U.S. at 555-56, 32 S.Ct. at 787-88; citing, *Buttz v. Northern Pacific Railroad Company*, 119 U.S. 55, 56, 66, 7 S.Ct. 100, 101, 104, 30 L.Ed. 330 (1887); *Northern Pacific Railway Company v. Townsend*, 190 U.S. 267, 271, 23 S.Ct. 671, 672, 47 L.Ed. 1044 (1903). The Court further held that upon execution of an agreement between the confederated-tribes of the Flathead Indian Reservation, and subsequent approval by Congress of that agreement, see, Ex. Doc. No. 15, 48th Cong., 1st Sess. (1892), the Indians had surrendered and relinquished all right, title and interest to the land comprising the right-of-way. 225 U.S. at 556, 32 S.Ct. at 788.

1711, 20 L.Ed.2d 697 (1968). Consequently, the court is constrained to conclude that the Blackfeet Tribe retains beneficial title to the land comprising the subject right-of-way across the Blackfeet Reservation, and therefore the territorial component essential to the valid exercise of the Blackfeet Tribe's taxing authority is satisfied.

The court finds it unnecessary to specifically address the remaining challenges advanced by the Railroad. The rationale expressed by the court in *Burlington Northern v. Assiniboine-Sioux Tribes of the Fort Peck Reservation*, CV-87-055-GF (D.Mont.1988), adequately disposes of these alternative arguments.¹¹

An appropriate order shall issue.

¹¹ The Blackfeet Tribe obtained approval from the Secretary of the Interior before it adopted its constitution announcing its intention to tax nonmembers. Further, before the ordinance imposing the tax challenged by the Railroad could take effect, the Tribe was required again to obtain approval from the Secretary. See, BLACKFEET CONSTITUTION, art. VI(1)(h). Both the Tribe's constitution and the challenged tax ordinance received the requisite approval from the Secretary of the Interior.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-4428

D.C. No. CV-87-120-PGH

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,

v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RES-
ERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL;
BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD
PERSON, Chairman; ARCHIE ST. GODDARD, Vice-Chair-
man; MARVIN WEATHERWAX, Secretary; ELOISE C.
COBELL, Treasurer,

Defendants-Appellees.

No. 88-4429

D.C. No. CV-87-55-PGH

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,

v.

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION; ASSINIBOINE & SIOUX TRIBES OF THE
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
Tribal Chairman; PAULA BRIEN, Tribal Secretary/
Accountant,

Defendants-Appellees.

ORDER

[Filed June 4, 1991]

Before: KOELSCH, BROWNING and BEEZER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

Excerpts from Act of April 15, 1874, ch. 96, 18 Stat. 28

CHAP. 96.—An act to establish a reservation for certain Indians in the Territory of Montana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following described tract of country, in the Territory of Montana, be, and the same is hereby, set apart for the use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may from time to time, see fit to locate thereon

APPENDIX E

Act of February 15, 1887, ch. 130, 24 Stat. 402

CHAP. 130.—An Act granting to the Saint Paul, Minneapolis and Manitoba Railway Company the right of way through the Indian reservations in Northern Montana and Northwestern Dakota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way is hereby granted, as hereinafter set forth, to the Saint Paul, Minneapolis and Manitoba Railway Company, a corporation organized and existing under the laws of the State of Minnesota, for the extension of its railroad through the lands in Northwestern Dakota set apart for the use of the Arickaree, Gros Ventre, and Mandan Indians by executive order dated July thirteenth, eighteen hundred and eighty, commonly known as the Fort Berthold Indian Reservation, and through the lands in Northern Montana, set apart by act of Congress approved April fifteenth, eighteen hundred and seventy-four, and commonly known as the Blackfeet Indian Reservation.

SEC. 2. That the line of said railroad shall extend from Minot, the present terminus of said Saint Paul, Minneapolis and Manitoba Railway, across said Fort Berthold Reservation, north of the township line between townships numbered one hundred and fifty-three and one hundred and fifty-four north; thence along the Missouri River by the most convenient and practicable route to the valley of the Milk River; thence along the valley of the Milk River to Fort Assinniboine; thence southwesterly to the Great Falls of the Missouri River.

SEC. 3. That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad as aforesaid; and said

company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine-shops, sidetracks, turnouts, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of its road.

SEC. 4. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of of way herein provided for until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, and until the compensation aforesaid has been fixed and paid; and the surveys construction and operation of such railroad shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.

SEC. 5. That the right of way across lands occupied or reserved for military purposes along the line of said railroad is hereby granted to said company the same as across said Indian reservations; *Provided, however,* That the survey and location of said railroad across such lands shall be first approved by the Secretary of War.

SEC. 6. That said company shall not assign or transfer or mortgage this right of way for any purpose whatever until said road shall be completed: *Provided,* That the

company may mortgage said franchise, together with the rolling stock, for money to construct and complete said road: *And provided further*, That the right granted herein shall be lost and forfeited by said company unless the road is constructed and in running order within two years from the passage of this Act.

Approved, February 15, 1887.

APPENDIX F

Excerpts from Act of May 1, 1888, ch. 213, 25 Stat. 113

* * * *

ARTICLE I.

Hereafter the permanent homes of the various tribes or bands of said Indians shall be upon the separate reservations hereinafter described and set apart. Said Indians acknowledging the rights of the various tribes or bands, at each of the existing agencies within their present reservation, to determine for themselves, with the United States, the boundaries of their separate reservation, hereby agree to accept and abide by such agreements and conditions as to the location and boundaries of such separate reservation as may be made and agreed upon by the United States and the tribes or bands for which such separate reservation may be made, and as the said separate boundaries may be hereinafter set forth.

ARTICLE II.

The said Indians hereby cede and relinquish to the United States all their right, title, and interest in and to all the lands embraced within the aforesaid Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservation, not herein specifically set apart and reserved as separate reservations for them, and do severally agree to accept and occupy the separate reservations to which they are herein assigned as their permanent homes, and they do hereby severally relinquish to the other tribes or bands respectively occupying the other separate reservations, all their right, title, and interest in and to the same, reserving to themselves only the reservation herein set apart for their separate use and occupation.

* * * *

ARTICLE VIII.

It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of Indians concerned.

* * * *

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that said agreement be, and the same is hereby, accepted, ratified, and confirmed.

SEC. 2. That for the purpose of carrying out the terms of said agreement the sum of four hundred and thirty thousand dollars is hereby appropriated, to be immediately available.

SEC. 3. That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

SEC. 4. The Secretary of the Interior is hereby authorized to appoint a commission, consisting of three persons, with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reser-

vation, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribes of Indians for such portion of their reservation as may be necessary for said band of Ute Indians of southern Colorado if said Indians shall determine to remove from their present location; the report of said commission to be made and subject to ratification by Congress before taking effect; and for this purpose the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated, which shall be immediately available.

Approved, May 1, 1888.

APPENDIX G

Adopted 1/27/87

Resolution #2150-87-1

Chapter 3. Utilities Tax

Section 301. *Definitions*

For the purposes of this Chapter, unless the context specifically requires otherwise:

(a) "Utility" means any publicly or privately owned railroad; communications, telegraph, telephone, electric power or transmission line; natural gas or oil pipeline; or similar system for transmitting or distributing services or commodities; but does not include roads or highways constructed or maintained by the United States, the Tribes or the State of Montana or a subdivision thereof.

(b) Property or an interest in property is "used for utility purposes" if it was granted, or is used, in connection with operation of a utility, as that term is defined herein.

(c) "Utility property" means all property used for utility purposes under any agreement conferring rights to use or possess trust land on the Reservation, other than an agreement transferring full title or full beneficial title, including but not limited to, a lease, right-of-way, use permit or joint venture or operating agreement with the United States or a beneficial owner of land. Utility property shall include all improvements placed on trust land on the Reservation pursuant to such an agreement.

(d) "Owner" means any person who owns any interest in utility property as grantee, lessee, permittee, assignee, sublessee, or transferee. In the case of parties to a joint venture or operating agreement, the Tribes shall determine whether a joint venture partner or an operator is an owner in light of the terms of the agreement on the

basis of the parties' respective participation in and entitlement to income or profits, assets and management of the venture or operation.

(e) "Person" means any individual, whether Indian or non-Indian, or any organization, including, but not limited to sole proprietorships, partnerships, joint ventures, trusts, estates, unincorporated associations, corporations and governments, or any division, department or agency of any of the foregoing.

(f) "Taxes" includes the tax and any interest, penalties or costs imposed or assessed pursuant to this Chapter.

* * * *

Section 303. *Tax Imposed.*

A tax of three percent (3%) of the value on each assessment date of all utility property is hereby imposed, provided however that all cooperative rural electrical or cooperative rural telephone associations organized and operated not for profit shall pay a tax of one percent (1%) of such value.

Section 304. *Assessment and Valuation.*

(a) The assessment date for each calendar year shall be January 1 of that year. Utility property shall be assessed annually as of the assessment date. The Tribes may assess unassessed utility property as of the date upon which they should have been assessed, and may re-determine incorrect or erroneous assessments.

(b) The value of utility property shall be presumed to be equal to the full value per linear mile of the utility as assessed by the State of Montana pursuant to Chapter 15-23 of the Montana Code Annotated, multiplied by the number of miles of the utility located on trust land within the Reservation. For purposes of this presumption the most recent Montana assessment made prior to the assessment date shall be used. Unless the presumed value

is challenged pursuant to Section 313, the tax shall be levied and collected upon the presumed value.

(c) If a presumption of value is challenged pursuant to Section 313, the value of the utility property shall be determined by the Tax Commission, after a hearing, based on one or more of the following methods:

(1) *Fair market value method.* On the basis of the selling prices of comparable property (whether within or outside the Reservation) which are sold by willing sellers to willing buyers, neither of whom are under a compulsion to act.

(2) *Present value of income method.* By computing the capitalized value of the gross income to be received from the property less the reasonable expenses to be incurred in producing the income, over the remaining useful life of the property.

(3) Any other method which reasonably and accurately reflects the value of the utility property.

Section 305. *Persons liable for payment.*

(a) All owners of utility property are liable for payment of the entire tax assessed upon that interest.

(b) If an owner is an association, joint venture or partnership, the associates, participants or partners both limited and general, shall be jointly and severally liable for the entire tax assessed upon that property.

(c) Each person liable for taxes under this section shall have a right of contribution from any other person liable for a share of the taxes paid proportionate to the share of such person in the utility property. The owners may, by agreement, alter the allocation by contribution of the tax liability among themselves; but no such agreement shall affect the liability to the Tribes of any person named in subsection (a) or (b) hereof.

Section 306. *Exemptions.*

The tax imposed by this Chapter shall not apply to:

(a) The Assiniboine and Sioux Tribes, any subdivision, agency or program of the Tribes or any enterprise or entity wholly owned by the Tribes;

(b) The United States or its subdivisions, agencies or departments, except to the extent such taxes are authorized by federal law; or

(c) Any utility owning utility property on trust lands on the Reservation with a total value of less than \$200,000.

If a utility property is owned in part by entities exempt under this Section and in part by entities not exempt, the proportionate share owned by nonexempt entities shall be subject to tax.

* * * *

RESOLUTION #2150-87-1

TRIBAL GOVERNMENT

WHEREAS, the Fort Peck Tribal Executive Board is the duly elected body representing the Assiniboiné and Sioux Tribes of the Fort Peck Reservation and is empowered to act on behalf of the Tribes. All actions shall be adherent to provisions set forth in the 1960 Constitution and By-laws and Public Law #83-449, and

WHEREAS, the Fort Peck Tribes have the authority and the need to tax utility companies on trust property to provide essential government services, and

WHEREAS, the Fort Peck Tribes have initiated a utility tax ordinance for utility property located on trust lands, and

WHEREAS, there was a public hearing held on January 30, 1987 at the Poplar Activity Center by the Reservation Development Committee at which time oral and written testimony was presented from the utility companies and the general public, and

WHEREAS, the Fort Peck Tribes have reviewed the comments and testimony received and have incorporated appropriate concerns into the ordinance, now

THEREFORE BE IT RESOLVED, that the Tribal Executive Board does hereby adopt the attached "Utility Tax Ordinance" as a part of the Comprehensive Code, Title XVII, Taxation, Chapter III.

CERTIFICATION

I, the undersigned Secretary/Accountant of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, hereby certify that the Tribal Executive Board is composed of 12 voting members of whom 8 constituting a quorum were present at a *Recessed Regular* Board meeting duly called and convened this 27th day of *January, 1987*, that the foregoing resolution was duly adopted at such meeting by the affirmative vote of 7 for 1 opposed 8 present.

/s/ Paula Brien
PAULA BRIEN
Secretary/Accountant

Recommended:

/s/ [Illegible]
Superintendent, Fort Peck Agency

APPROVED:

/s/ Kenneth E. Ryan
KENNETH E. RYAN
Tribal Chairman
Fort Peck Executive Board

APPENDIX H

THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN NATION

BLACKFEET TRIBAL ORDINANCE
PROVIDING FOR A
POSSESSORY INTEREST TAX

Number: 80

As Amended

By Resolution No. 213-87

* * * *

Section 3. DEFINITIONS.

Unless the context otherwise requires in this Ordinance, the following definitions shall apply:

(a) *Tribe.*

"Tribe" shall mean the Blackfeet Tribe of the Blackfeet Indian Reservation.

(b) *Blackfeet Indian Reservation or Reservation.*

"Blackfeet Indian Reservation" or "Reservation" shall mean all lands subject to the jurisdiction of the Blackfeet Tribe and includes any and all lands within the exterior boundaries of the Blackfeet Reservation, regardless of whether they are owned in fee, whether they be allotted or Tribal lands, or whether they be otherwise held.

(c) *Chairman.*

"Chairman" shall mean the Tribal Chairman of the Blackfeet Tribe.

(d) *Superintendent.*

"Superintendent" shall mean the Superintendent of the Blackfeet Agency, Bureau of Indian Affairs.

(c) *Tribal Court.*

"Tribal Court" shall mean the Blackfeet Tribal Court as described in the Blackfeet Law and Order Code and does not include the Court of Appeals of the Blackfeet Tribe.

(f) *Court of Appeals.*

"Court of Appeals" shall mean the Blackfeet Court of Appeals as described in the Blackfeet Law and Order Code.

(g) *Taxable Person.*

"Taxable Person" shall mean any person or entity, including any individual, partnership, corporation or other legal entity, having ownership rights in any possessory interest within the Blackfeet Indian Reservation.

(h) *Possessory Interest.*

"Possessory Interest" shall mean any non-exempt interest in real property within the exterior boundaries of the Blackfeet Indian Reservation, including the value of any property or improvements thereon. Examples of such interests include: (1) those held in fee (2) those held under lease (3) those held under permit (4) those held under an easement or right-of-way.

(i) *Market Value.*

"Market Value" is the value at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

(j) *Commercial Business.*

"Commercial Business" shall mean any person or entity organized primarily for the purpose of operating a retail sales or service business on the Reservation. Commercial Business as defined herein does not include a utility.

(k) *Utility.*

"Utility" shall mean any privately or publicly held entity engaged in supplying, transmitting or distributing electricity, gas, water, telephone, telegraph or other communication services, or transportation services.

Section 4. RATE OF TAX.

The possessory interest tax set forth herein shall be assessed at the rate of four percent (4%) of the market value of the possessory interest as determined and computed in accordance with this Ordinance. Said rate of tax shall be and remain the same as herein established unless modified by an ordinance of the Blackfeet Tribal Business Council.

Section 5. COMPUTATION OF VALUE OF POSSESSORY INTEREST.

The value of a possessory interest shall be computed as provided in this section or by any other method adopted by the Tax Administration Division of the Tribe which accurately reflects the fair market value of the possessory interest which is subject to taxation.

(a) *Date of Valuation.*

All property that is subject to valuation under this Ordinance for all or any part of any tax year shall be valued as of October 1st of each year. Tax assessments for the following year shall be made based upon this value.

(b) *Method of Valuation.*

The value of a possessory interest, including all property and improvements thereon, shall be 100% of market value, as that market value is stated on the assessment books of the county assessor for the county or counties in which the property is located, as apportioned to the Reservation, said apportionment being made on a mileage basis or on a per unit basis.

(c) *Independent Appraisal Option.*

As an alternative to accepting the market value of any possessory interest subject to the tax as being that market value stated in the assessment book of the county assessor for the county or counties in which the property is located, as apportioned to the Reservation, the Tax Administration Division may have the particular possessory interest assessed by a qualified independent appraiser when both the Tax Administration Division and the taxpayer holding the possessory interest agree in writing:

- (1) on a particular independent appraiser to do the appraisal;
- (2) that the taxpayer shall bear the costs of the independent appraisal;
- (3) to accept the results of the independent appraisal;
- (4) that the independent appraisal shall be completed by November 1st of the year preceding the tax year.

* * * *

Section 11. EXEMPTIONS.

1. No possessory interest which consists of a service line of a utility which exclusively serves the Blackfeet Indian Reservation or of a delivery or distribution facility of a utility which exclusively serves the Blackfeet Indian Reservation shall be subject to this tax. Utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall be subject to this tax.

2. No possessory interest held by the United States, by the Blackfeet Tribe, by the State of Montana, or by counties, cities, towns or school districts within the State of Montana shall be subject to this tax.

3. No possessory interest in property which is used as a homesite, farm, or ranch whether held by or through an allotment or lease thereof, a Blackfeet tribal land assignment or lease, held in fee, or otherwise held, shall be subject to this tax.

4. No possessory interest in property which is used as a commercial business, whether held by or through an allotment or lease thereof, a Blackfeet tribal land assignment or lease, held in fee, or otherwise held, shall be subject to this tax.

* * * *

BLACKFEET TRIBE OF THE BLACKFEET
INDIAN RESERVATION

/s/ Archie S. Goddard acting
EARL OLD PERSON
Chairman

[SEAL]

ATTEST:

CERTIFICATION

I hereby certify that the foregoing Ordinance was adopted by the Blackfeet Tribal Business council in a duly called, noticed and convened Special session assembled for business on the 3rd day of March, 1987, with Six members present to constitute a quorum and by vote of Five members for and -0- members opposed, with one (1) member abstaining.

/s/ [Illigible]
Secretary Blackfeet Tribal Business Council

68a

APPENDIX I

[UNM Logo]

THE UNIVERSITY OF NEW MEXICO
WORKING PAPERS IN ECONOMICS

POSSESSORY INTEREST TAX STUDY

Prepared for the Blackfeet Tribe
of the Blackfeet Indian Nation

Department of Economics
The University of New Mexico
Albuquerque, New Mexico 87131

POSSESSORY INTEREST TAX STUDY

Prepared for the Blackfeet Tribe
of the Blackfeet Indian Nation

Alfred L. Parker
Professor of Economics
Chairman, Department of Economics
University of New Mexico

Introduction

The material presented in this Report has been developed at the request of the Blackfeet Tribe of the Blackfeet Tribe of the Blackfeet Indian Nation. It is the purpose of this Report to provide some basic information concerning the tax ordinance approved by the Tribal Council on December 30, 1986. The information provided includes an economic evaluation of the Possessory Interest Tax, the identification of potential taxpayers and the development of an estimate of the level of tax revenues to be realized by the Blackfeet Tribe from the new ordinance.

* * * *

Desirable Features of the Possessory Interest Tax

There are several features (or characteristics) of the Possessory Interest Tax that make it a very desirable tax from the perspective of the Blackfeet Indian Tribe. The desirable features of the tax include the following:

- (1) *Stability*—The tax base (installed price less depreciation) does not vary much from year to year and thus must be considered a very stable and certain source of revenue for the Blackfeet Indian Tribe. The cost associated with moving installed pipeline, electric transmission or telephone lines or the cost that would be incurred from the abandonment of such facilities supports the conclusion that the Pos-

sessory Interest Tax has considerable stability and predictability over time.

- (2) *Exportability*—With few exceptions the property that would be subject to the Possessory Interest Tax are owned by individuals and/or companies located beyond the boundaries of the Blackfeet Indian Reservation and beyond the boundaries of Pondera and Glacier Counties. To the extent that utility bills are impacted by the Possessory Interest Tax, it is clear that most of the additional amounts paid for utility service would come from consumers located beyond the boundaries of the Blackfeet Indian Reservation and Pondera and Glacier Counties. To the extent that revised federal tax codes permit the tax to be shifted through federal income tax deductions, a portion of the tax would be shifted to the federal government.

* * * *



(2)
No. 91-545

Supreme Court, U.S.

FILED

NOV 1 1991

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.

FORT PECK TRIBAL EXECUTIVE BOARD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

OPPOSITION OF FORT PECK RESPONDENTS TO
PETITION FOR WRIT OF CERTIORARI

REID PEYTON CHAMBERS *
MARVIN J. SONOSKY
HARRY R. SACHSE
WILLIAM R. PERRY
SONOSKY, CHAMBERS, SACHSE
& ENDRESON
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240
Counsel for the
Fort Peck Respondents

* Counsel of Record

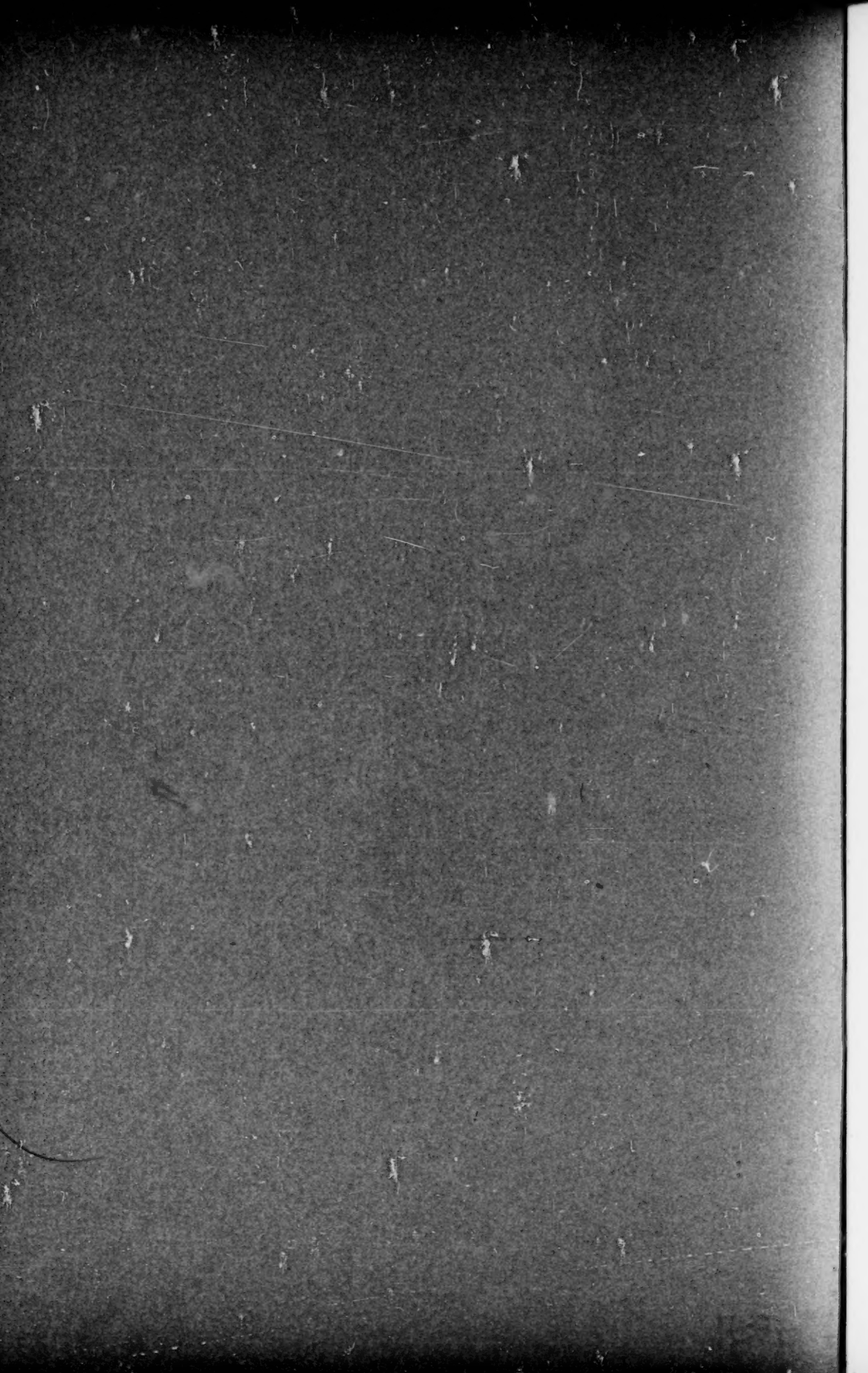


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BURLINGTON NORTHERN RAILROAD COMPANY,
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**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**OPPOSITION OF FORT PECK RESPONDENTS TO
PETITION FOR WRIT OF CERTIORARI**

INTRODUCTION

Burlington Northern Railroad Company (Burlington) seeks review of the decision below sustaining a tax imposed by the Assiniboine and Sioux Tribes (Tribes or Fort Peck Tribes) on Burlington's utility property on a right of way across reservation land held in trust by the United States for the Tribes. The petition poses two questions. (Pet. i.) The first goes to the scope of this Court's decisions on tribal taxing power—*i.e.* whether tribes' power to tax nonmember activities on trust lands is limited to situations where there is a consensual rela-

tionship between the tribe and the nonmember putative taxpayer. The second is simply an excuse for Burlington's unfounded forecast of impacts that Burlington asserts will flow from the decision below.

With respect to the first question, this Court three times in the past eleven years has sustained tribal power to tax non-Indians using Indian trust lands. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). The Court earlier sustained such a tax in *Morris v. Hitchcock*, 194 U.S. 384 (1904).

The Court has held:

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. . . . The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands.

Merrion, 455 U.S. at 137 (1982). The Court based the tribal taxing power not on a consensual relationship with the taxpayer, but on "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Ibid*. The Court concluded that if tribes are ever to be self-governing and provide essential governmental services, as intended by longstanding congressional and executive policy, they must retain the sovereign power to tax non-Indian activities on reservation trust lands owned by a tribe or individual Indians. *Id.* at 137-139 and n.5.

In the district court and court of appeals, Burlington did not contest the Tribes' taxing authority on trust

lands. Burlington argued instead that the Tribes had no power to tax (a) because the Tribes' trust title in the lands underlying the right of way had been completely extinguished, and (b) because general railroad statutes that do not mention Indian tribes divested tribes of the power to tax railroads. The Tribes and the United States opposed Burlington on both issues. Both the district court and the court of appeals rejected Burlington's arguments and applied this Court's recent holdings in a straightforward way to sustain the Tribes' tax.

Before this Court, Burlington does not ask the Court to review the lower courts' rejection of its arguments below. Rather, it tries to create confusion where there is none and manufacture an issue for review. Burlington, to gain exemption from tribal taxation, would have this Court apply here its decisions limiting tribal authority to *prosecute crimes* by non-Indians, or to regulate their activities *on non trust (fee) lands* owned by non-Indians—decisions that no court has ever applied to tribal authority over non-Indians using *trust* lands owned by Indians.

This Court has repeatedly and clearly upheld tribal taxation of non-Indian activities on reservation trust land owned by Indians. The court of appeals followed those precedents, as has every lower federal court ever to consider the issue. There is no reason for this Court to review.

STATEMENT OF THE CASE

The Fort Peck Tribes enacted an ordinance, approved by the Secretary of the Interior, taxing the property of public and private utilities located on trust lands on their Reservation.¹ Burlington filed this action in the United

¹ Def'ts' Ex. 1. Portions of the ordinance are reproduced as Pet. App. G. Exhibits 1 through 10 are attached to Defendants' Memorandum in Support of Motion to Dismiss, filed March 20, 1987 in the district court.

States District Court for the District of Montana on March 11, 1987 to enjoin application of the Tribes' tax to its property on a right of way of 84 miles bisecting the Reservation.

The district court granted summary judgment in favor of the Tribes, and denied Burlington's motion for permanent injunctive relief. 701 F. Supp. 1493, Pet. App. B. The court of appeals unanimously affirmed, 924 F.2d 899, Pet. App. A, and denied Burlington's petition for rehearing, with no judge dissenting. The United States filed a brief *amicus curiae* before the court of appeals supporting the validity of the Tribes' tax.

The background of the Fort Peck tax is as follows. The Tribal Executive Board, the Tribes' legislative body, decided in December 1986 to consider a draft ordinance imposing a three percent tax on the property of utilities that use trust lands on the Reservation.² The Board scheduled a public hearing on the draft tax ordinance before its Reservation Development Committee on January 20, 1987.³ At the hearing, several small non-profit rural cooperative associations providing electrical and telephone services on the Reservation testified that the tax rate was considerably higher than the rate imposed on non-profit cooperatives by the State of Montana, and would substantially injure their businesses. A representative of the local county and a tribal member also testified.⁴ Burlington did not appear at the hearing, and presented no written testimony.

² Def'ts' Ex. 2.

³ Def'ts' Ex. 2. On December 19, 1986, as requested by the Tribes, the Bureau of Indian Affairs (BIA) Agency Superintendent posted public notices of the hearing at prominent places on the Reservation. The notice stated that copies of the draft ordinance were available from the Fort Peck BIA Agency and the Tribal Office. Def'ts' Ex. 5.

⁴ All testimony was recorded, and most witnesses submitted written comments as well. Def'ts' Ex. 6 is a compilation of written statements presented at and subsequent to the public hearing.

On January 27, 1987, the Tribal Executive Board enacted the utility property tax ordinance. The Board decided to make two changes in the proposed ordinance after considering testimony presented at the hearing. First, the Board reduced the contemplated tax rate for non-profit cooperative rural electrical and cooperative rural telephone associations from three percent to one percent. Second, it exempted from taxation any utility owning property on trust lands on the Reservation with a total value of less than \$200,000. The Bureau of Indian Affairs approved the ordinance on January 28, 1987.⁵ The largest single taxpayer, Northern Border Pipeline Company, has paid the Tribes' tax without protest, as have several smaller utility companies using reservation trust lands.

Burlington's operations on the Reservation have resulted in frequent fires on Indian trust lands and serious automobile accidents involving Indians, which have required tribal fire protection and law enforcement services.⁶ Since the record was closed in the district court, the Fort Peck Tribes and local county governments have worked together to develop emergency plans to respond to any spill of hazardous materials carried by Burlington across the Reservation, as required by regulations of the Environmental Protection Agency⁷ under the Superfund Amendments and Reauthorization Act of October 17, 1986, Pub. L. 99-499, 100 Stat. 1613, 42 U.S.C. §§ 11001-11050.

⁵ Def'ts' Ex. 2.

⁶ Affidavit of Tribal Chairman Kenneth E. Ryan, Def'ts' Ex. 11, p. 5. Defendants' Exhibits 11 through 15 are attached to the Brief in Opposition to Motion for Preliminary Injunction filed April 3, 1987.

⁷ 40 CFR §§ 350.1, 350.20 and 370.2 require Indian tribes to develop emergency response plans on reservations under this Act.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW CORRECTLY APPLIED RECENT DECISIONS OF THIS COURT SUSTAINING TRIBAL POWER TO TAX NONMEMBERS DOING BUSINESS ON INDIAN TRUST LANDS ON THEIR RESERVATIONS.

A. The Decision Below Is Consistent With the Principles Established by This Court in Cases Involving Tribal Taxes of Activities on Trust Land.

Simply put, this Court's decisions teach that tribes have civil taxing authority over nonmembers' activities *on trust lands*,⁸ where those activities significantly affect a tribe. The courts below correctly applied this principle to resolve this case.

Every case ever to consider tribal taxing power over non-Indian activities *on Indian trust lands* has sustained that power—over ninety years and in a great variety of circumstances: *Morris v. Hitchcock*, 194 U.S. 384 (1904) (permit taxes on livestock grazed on tribal trust land); *Colville*, 447 U.S. 134 (1980) (retail sales or excise taxes on purchases of cigarettes); *Kerr-McGee*, 471 U.S. 195 (1985) and *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983) (possessory interest tax measured by value of leasehold interests in tribal lands and business activity tax measured by the gross receipts from business activity on reservation trust lands); *Merrion*, 455 U.S. 130 (1982), and *Conoco, Inc. v. Shoshone and Arapahoe Tribes*, 569 F. Supp. 801 (D.

⁸ The Fort Peck tax ordinance on its face applies *only* to utility property on reservation trust lands. Section 301(c) imposes the tax on "all property used for utility purposes under any agreement conferring rights to use or possess trust land on the Reservation." Def'ts' Ex. 1, Pet. App. 57a. The Blackfeet ordinance authorizes taxation of possessory interests on all lands within the reservation, including fee lands. The Blackfeet Tribe does not claim that application of its tax to Burlington's possessory interest in its right of way involves fee lands, and Burlington concedes that the Ninth Circuit's decision does not validate taxing non-Indians on fee lands. Pet. 28-29.

Wyo. 1983) (severance taxes on non-Indian mineral lessees of trust lands); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), and *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (taxes on nonmember lessees of trust grazing and farm land). Burlington does not claim any conflict among lower court decisions, and there is none.

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), this Court upheld tribal taxes on nonmember purchases of cigarettes by Indians and non-Indians on reservation trust lands. The Court held that "the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty" and that "federal law to date has not worked a divestiture of Indian taxing power." *Id.* at 152.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court sustained a tribal oil and gas severance tax imposed on nonmember lessees of minerals on reservation trust lands who held leases lasting "for so long as the minerals are produced in paying quantities." *Id.* at 135. The Court followed and elaborated on *Colville*, specifically holding that:

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. See *e.g.*, *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824).

Id. at 137. The Court in *Merrion* considered and rejected an argument made by the oil and gas lessees, and adopted

by three Justices in dissent, that since the lessees had leased the lands for over twenty years before the tax was enacted, and could not be excluded from the reservation, the tribe had surrendered its power to tax them. *Id.* at 141-148.

The Court's unanimous decision in *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985), sustained that tribe's possessory interest and business activity taxes on non-Indian companies holding mineral leases on reservation trust lands as within "the established, pre-existing power of the Navajos to levy taxes." *Id.* at 199. The Court observed that:

the Federal Government is "firmly committed to the goal of promoting tribal self-government." . . . The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools and social programs.

Id. at 200-201.

The Court in these three recent cases examined and relied on the historic tradition of tribal governmental authority as recognized by all three branches of the Federal Government since the mid 19th century. The Court relied upon three formal opinions of the Attorney General beginning in 1855, 7 Op. A.G. 174 (1855), 17 Op. A.G. 134 (1881), 23 Op. A.G. 214 (1900), and one opinion by the Solicitor of the Interior Department in 1934, 55 I.D. 14, 46—all of which "recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Colville*, 447 U.S. at 152-153; *Merrion*, 455 U.S. at 139; see *Kerr-McGee*, 471 U.S. at 199. The Court relied on several prior federal court decisions—including this Court's much earlier decision in *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904)—which "have acknowledged tribal power to tax

non-Indians entering the reservation to engage in economic activity." *Colville*, 447 U.S. at 153; see *Merrion*, 455 U.S. at 141-143.

The Court also concluded that "Congress has acknowledged that the tribal power to tax is one of the tools necessary to self-government and territorial control." *Merrion*, 455 U.S. at 139-140 (relying on a Senate Judiciary Committee acknowledgment of the validity of a tribal tax imposed on non-Indians within the tribe's territory in 1879); see also *Colville*, 447 U.S. at 153 ("authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where that tribe has a significant interest in the subject matter, was very probably one of the tribal powers under 'existing law' confirmed by § 16 of the Indian Reorganization Act of 1934"); see also *Kerr-McGee*, 471 U.S. at 199. Many of these historic authorities relied upon by the Court date from the 19th century or early 20th century, contemporaneous with the time Burlington's predecessors were granted rights of way over the Fort Peck and Blackfeet reservations.

Faced with these holdings of the Court, Burlington in the courts below did not challenge the general taxing power of Indian tribes, and "concede[d] . . . the general power of the various Indian tribes to tax the transactions of non-Indians which occur on trust lands and significantly involve a tribe or its members."⁹ 701 F. Supp. at 1496, Pet. 20a. In the courts below, Burlington predicated its case on its version of its property rights. Burlington contended that the Fort Peck and Blackfeet Tribes retained no property interest in lands over which the rights of way of Burlington's predecessor were

⁹ Railroad's Brief in Support of Motion for Preliminary Injunction, filed March 11, 1987, p. 20; Brief of Appellant Railroad before the Ninth Circuit, p. 21.

granted, and therefore the Tribes lacked power to tax Burlington.¹⁰

The court of appeals, as well as the district court, rejected Burlington's "property" argument. Both courts carefully examined the language, history and circumstances of the agreements and statutes underlying the establishment of the Fort Peck and Blackfeet reservations. 924 F.2d at 902-904, Pet. 6a-12a; 701 F. Supp. at 1496-1503, Pet. 21a-35a. The courts noted that the Act of April 15, 1874, 18 Stat. 28, Pet. App. D, had established a single large reservation for the three tribes affected, including the Fort Peck Tribes and the Blackfeet Tribe; that in late 1886 and early 1887, the United States by separate agreements with the three tribes defined three separate and relatively smaller reservations of which two are the current Fort Peck and Blackfeet reservations; and that by those agreements the tribes ceded large areas of land *and agreed to grant a railroad right of way through the retained reservations*.¹¹ 701

¹⁰ *E.g.*, Brief of Appellant Railroad, pp. 9-15.

Burlington also contended in the courts below that Congress had divested the Tribes of power to tax railroads by special legislation applicable to railroads, chiefly the Railroad Revitalization and Regulatory Reform Act of February 5, 1976, 90 Stat. 31, 49 U.S.C. § 11503. *E.g.*, Brief of Appellant, pp. 21-29. Burlington does not suggest that the lower courts' rejection of this argument merits review in this Court.

¹¹ Article VIII of the 1886 Fort Peck Agreement provides as follows:

It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, . . . through any portion of either of the separate reservations established and set apart under the provisions of this agreement, *right of way shall be, and is hereby, granted* for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

Def'ts' Ex. 14. (Emphasis added.)

F. Supp. at 1496, Pet. 21a, n.1; 924 F.2d at 900, Pet. 2a. Congress then ratified the agreements by the Act of May 1, 1888, 25 Stat. 113.¹² 924 F.2d at 900, Pet. 2a. See also *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159, 162 (1936); *Winters v. United States*, 207 U.S. 564, 567-568, 575-576 (1908) (describing generally these agreements and statutes). As the court below found:

The parties agree that in 1887, after the agreement was signed but before its ratification, Congress granted Burlington Northern's predecessor-in-interest right of way through what would become the Fort Peck Reservation, occupied by the Assiniboine and Sioux Tribes. See Act of February 15, 1887, 24 Stat. 402.

924 F.2d at 900-901, Pet. 3a.

Based on this study and review, the courts below held that the grant of the railroad easement *did not* extinguish the beneficial title of either tribe in the lands underlying the easement. This decision was identical to decisions of this Court relating to public lands, holding that similar language vested railroads with an easement only in a right of way across public lands, not a fee. 924 F.2d 903, Pet. 8a-9a. Applying this Court's decisions in *Colville* and *Merrion*, the courts below then ruled that "[t]he Tribes' power to tax nonmembers derives from the Tribes' continuing property interest." 924 F.2d at 904, Pet. 10a-12a; see also 701 F. Supp. at 1495-1496, Pet. 18a-20a.¹³ The determination by the courts below

¹² Portions of the 1888 Act are contained in Pet. App. F.

¹³ The court of appeals also found that "the Tribes have a significant interest in" the subject matter of Burlington's right of way because Burlington receives tribal services—"the tangible benefits of police and fire protection." 924 F.2d at 904, Pet. 10a. Burlington does not deny that it does receive these benefits, *cf.* Pet. 19, and the lower court's finding is well supported by the record, which showed that Burlington's activities on the Reservation frequently cause

that Burlington's right of way crosses reservation trust lands was based on the specific circumstances of the statutes and agreements pertaining to these two reservations, was correct, and does not present a question of general applicability meriting review by this Court.

B. There Is No Confusion or Inconsistency in This Court's Decisions Concerning Tribal Taxing Authority.

Burlington, aware that the land title issue, the principal issue litigated below, presents no question calling for this Court's review, shifts to a fundamentally different issue before this Court. Burlington's petition now urges review on the theory that the lower court "uncritically" followed *Colville* and *Merrion* in a manner inconsistent with "the principles set forth" in four other cases—*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981); and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. 8-9, 15. Burlington claims that these four decisions require a holding that tribes have no governmental authority to tax nonmembers using trust lands where the nonmember has not entered into a "consensual" relationship with the tribe or its members.

Burlington is wrong for several reasons—most fundamentally because it seeks to apply this Court's rulings regarding tribes' criminal jurisdiction and those regarding tribal civil jurisdiction over matters on fee lands, to tribes' taxing authority over activities on reservation trust lands. This Court, however, in all of its recent cases has emphasized that the limitations regarding tribal criminal jurisdiction and civil jurisdiction on fee

fires and automobile accidents that injure Indians and their property and require tribal services. Affidavit of Tribal Chairman Kenneth E. Ryan, Def'ts' Ex. 11, p. 5.

lands simply do not apply to tribal taxing authority on trust lands.

Oliphant and *Wheeler* concern tribal criminal jurisdiction, and teach that tribes have criminal authority over members, and not over nonmembers. See also *Duro v. Reina*, 495 U.S. —, 109 L.Ed.2d 693 (1990).¹⁴ As the Court specifically recognized in *Colville*, 447 U.S. at 153, cases concerning taxing and other civil authority of tribes over nonmembers on reservation trust lands “differ sharply with *Oliphant*” because the historic tradition of tribal authority to tax is different. See pp. 8-9, *supra*. See also *Duro v. Reina*, 495 U.S. at —, 109 L.Ed.2d at 705 (“[O]ur decisions recognize broader retained tribal powers outside the criminal context”); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853-854 (1985) (“[T]he reasoning of *Oliphant* does not apply to this case”); FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, pp. 253-254 (1982 ed.).¹⁵

Montana and *Brendale* hold that on *fee* lands owned by non-Indians, a tribe’s regulatory power is limited to (1) “activities of nonmembers who enter consensual relationships with the tribe or its members,” or (2) “conduct of non-Indians [that] . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 565-566; accord *Brendale*, 492 U.S. at 428 (plurality

¹⁴ Congress, however, very recently passed legislation determining that tribes *do* have authority to try and punish crimes committed on their reservations by Indians who are members of other federally recognized tribes. Act of October 28, 1991, Pub. L. 102-137.

¹⁵ Congress has likewise placed greater restrictions on the autonomy of tribes to try criminal cases than civil cases. Thus, while the Indian Civil Rights Act of April 11, 1968, 82 Stat. 78, 25 U.S.C. § 1303, confers *habeas corpus* jurisdiction on federal courts to review tribal court criminal convictions alleged to violate that Act, the Act leaves tribal courts free from federal court review of civil cases. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

opinion of Justice White); *id.* at 456-457 (opinion of Justice Blackmun). In both these cases, the Court reiterated the distinction between tribal authority over non-Indian activities on trust lands and over non-Indian activities on fee lands on the reservation.¹⁶ *Brendale*, 492 U.S. at 427 (plurality opinion of Justice White) (“*Colville* . . . involved ‘[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members.’ . . . It did not involve the regulation of fee lands, as did *Montana*.”); *Montana*, 450 U.S. at 557 (tribe can “prohibit nonmembers from hunting or fishing on land . . . held . . . in trust. . .”)

The “consensual relationships” test was first formulated in *Montana* to describe situations where “even on fee lands” tribes might retain some regulatory authority over nonmembers. Burlington grasps at this consensual test as creating a supposed “confusion concerning the scope of an Indian tribe’s power to tax nonmembers.” Pet. 17. Burlington reads this Court’s decisions to mean tribes have no power to tax nonmembers on trust lands unless a consensual relationship exists. Burlington’s petition depends on this self-created confusion as a reason for granting review.¹⁷

¹⁶ Indian owned lands on reservations are ordinarily held in trust for tribes or individual Indians by the United States. *E.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 166-167 (1989). Many reservations were opened by Congress to homesteaders in the decades around the turn of the century, and substantial acreage within them was patented to non-Indians. The Court has held that these opening statutes diminished tribal governmental authority over these fee patent lands owned by non-Indians. *E.g.*, *Montana*, 450 U.S. at 558-561; *Brendale*, 492 U.S. at 422-423 (plurality opinion of Justice White).

¹⁷ Burlington even fancies that “the existence of a consensual relationship between the tribe and the nonmember taxpayer” is “the traditional foundation of tribal taxation.” Pet. 10, 20. The Court held the contrary in *Merrion*: that tribal power to tax “derives

The holding in *Montana* itself shatters Burlington's contention. The Court in *Montana* "readily agree[d]" that a tribe can "prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe," 450 U.S. at 557, specifically affirming the Ninth Circuit in this respect. And the Court also determined that the tribe in *Montana* had no "consensual relationship" with the nonmember hunters and fishermen subjected to tribal authority on trust lands. 450 U.S. at 565-566. See also *Duro v. Reina*, 495 U.S. at —, 109 L.Ed.2d at 705, ("[a]s distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or 'consensual relationships with the tribe or its members. . . .'" (emphasis added)). And as to taxation, this Court stated specifically that "[w]hatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority." *Merrion*, 455 U.S. at 147.

The court below thus correctly applied the decisions of this Court when it held that "[t]he relevant question is not whether Burlington Northern's activities on the reservation were consensual," 924 F.2d at 904, because that question would only be relevant if a tribe sought to tax activities on fee lands. Burlington concedes that the decision below does not validate any tax on fee lands. Pet. 28-29.¹⁸ In summary, Burlington's assertion cannot con-

from the tribe's general authority, as sovereign, to control economic activity . . . and to defray the cost of providing governmental services." 455 U.S. at 137. In *Merrion*, moreover, the Court specifically rejected the argument of non-Indian oil companies that, *because* they had a "consensual relationship" with the tribe, the tribe could *not* tax them. *Id.* at 136-137.

¹⁸ Burlington alleges that other tribes have enacted tax ordinances that apply to fee lands, and argues that this somehow supports review of this case, Pet. 29. Nothing in the decision below validates any such taxes, as Burlington concedes. *Ibid.* Lower federal courts

fuse the established holdings of this Court sustaining tribal taxing power relating to trust land owned by Indians with the “consensual relationships” decisions relating to fee land patented to non-Indians.

But, even if a consensual relationship were required for tribes to tax non-Indians using reservation trust lands, the court below correctly found that such a consensual relationship exists in this case, because these tribes “consented to railroad rights of way” in the 1886 and 1887 cession agreements later ratified by Congress in the 1888 Act. 924 F.2d at 904, n.7, Pet. 11a. This interpretation of these particular agreements and statute is correct and does not merit review by this Court.

II. THE TRIBAL AUTHORITY TO TAX SUSTAINED BELOW DOES NOT HAVE “NATIONWIDE IMPLICATIONS” OR OPEN THE DOOR TO UNLIMITED TRIBAL TAXATION.

Burlington’s second question for review (Pet. i) is whether the tribal tax power extends to railroads in interstate commerce operating over rights of way acquired from the United States, where discontinuance of the rights of way is subject to federal regulation. The petition contains no explicit discussion in support of the second question. Essentially, Burlington asserts unfounded fears that if the courts below are correct, tribes will impose discriminatory taxes against nonmembers that will threaten to have a significant adverse impact on the financial condition of the Nation’s railroads; that the same might happen to other interstate carriers; and that the door would be open to virtually unlimited tribal taxation. Pet. i, 8, 10, 22.

clearly have ample jurisdiction to determine whether or not a tribe has taxing authority in those circumstances, *e.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and there is no reason to believe these courts will misconstrue the decisions of this Court concerning tribal authority on fee lands.

Burlington's charges are wholly without merit or support in the record below. First, the tribal authority to tax recognized by the court of appeals in this case is limited to utilities that have chosen to use reservation trust lands owned by Indians. And second, as the Court held in *Merrion*, 455 U.S. at 141, tribal authority to tax nonmembers:

is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Indian tribes are subject to substantial federal control. Both tribal tax ordinances at issue in this case were reviewed and approved by the Secretary of the Interior,¹⁹ as required by the tribal constitutions.²⁰ And as this Court recognized in *Kerr-McGee*, 471 U.S. at 198, "Congress, of course, may erect 'checkpoints that must be cleared before a tribal tax can take effect.'" In fact, Congress in the wake of adoption of these very taxes *considered but did not enact* legislation proposed by members of the Montana congressional delegation to limit tribal taxing power.²¹

¹⁹ Def'ts' Ex. 2.

²⁰ Article VII, Section 3 of the Fort Peck Constitution, Def'ts' Ex. 3, empowers the Tribal Executive Board:

To make and enforce ordinances covering the tribes' right to levy taxes and license fees on persons or organizations doing business on the reservation, except that ordinances or regulations affecting non-members trading or residing within the jurisdiction of the tribes shall be subject to the approval of the Secretary of the Interior.

²¹ In April 1987, both Montana's Senators and a Congressman from Montana introduced bills to require all tribal taxes on non-

Burlington offers no reason for its broad assertion that, in effect, the Court should recast the law to exempt railroads from tribal taxation when they use Indian trust lands. Railroads do not just “happen to cross . . . reservations” with no impacts on surrounding Indian communities. *Cf.* Pet. 25. Clearly, Burlington is more than “a convenient revenue source,” Pet. 25; its activities require expenditure of tribal revenues and impact significantly on tribal members. *See* pp. 5, 11 n.13, *supra*. Railroads and utilities receive the benefit of police, fire, and other services on these reservations, as in all other jurisdictions they cross. States tax railroads and utilities even though they may be out-of-state companies who cannot “vote” in the state. *See generally Merrion*, 455 U.S. at 137-138 (“Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal governments”).

Tribal taxation of railroad property on reservation trust lands furthers congressional policies of tribal economic self-sufficiency and tribal self-determination. As this Court stated in *Merrion*:

[w]e agree with Judge McKay’s observation that “[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes.”

455 U.S. at 138 n.5. This Court has often affirmed the importance of these modern congressional policies favor-

members to be reviewed by the Secretary of the Interior and to impose a moratorium on all new tribal tax ordinances. S. 1039, 100th Cong., 1st Sess. introduced on April 10, 1987; H.R. 2184, introduced on April 28, 1987. No hearings were held on the House bill. The Senate Select Committee on Indian Affairs held a hearing on November 12, 1987. The bill died in committee.

ing tribal self-determination and economic self-sufficiency. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987) (“[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members”); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (“Congress’ objective of furthering tribal self-government . . . includes Congress’ overriding goal of encouraging ‘tribal self-sufficiency and economic development’”).

Congress recently expanded the powers of tribes to be the primary provider of governmental services on their reservations while reducing the role of the Bureau of Indian Affairs. Act of October 5, 1988, Pub. L. 100-472, 102 Stat. 2285 (amending the Indian Self-Determination Act, 25 U.S.C. §§ 450 *et seq.*). In doing so, the Senate report stated:

Indian tribal governments have developed rapidly since passage of the Indian Self-Determination Act [in 1975]. In addition to operating health services, human services, and basic governmental services such as law enforcement, water systems and community fire protection, tribes have developed the expertise to manage natural resources and to engage in sophisticated economic and community development. . . . This progress is directly attributable to the success of the federal policy of Indian self-determination.

S. Rep. No. 274, 100th Cong., 1st Sess., p. 4 (1987).

Burlington is of course free to seek redress from Congress, which holds ultimate power in this matter. As Burlington’s own petition acknowledges, the Nation’s railroads have been far from “powerless” in recent years to persuade Congress to “enact . . . legislation designed to improve their economic condition.” Pet. 27 & n.24. But unless Congress acts—in derogation of its own policies of furthering tribal self-determination and economic self-sufficiency—the power of tribes to tax activities on

reservation *trust* lands, as affirmed repeatedly by this Court, remains intact. The court of appeals decision simply followed this Court's decisions on tribal taxing authority. No review by this Court is warranted.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

REID PEYTON CHAMBERS *
MARVIN J. SONOSKY
HARRY R. SACHSE
WILLIAM R. PERRY
SONOSKY, CHAMBERS, SACHSE
& ENDRESON
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240
Counsel for the
Fort Peck Respondents

Dated: November 1, 1991

* Counsel of Record

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No. 91-545

Supreme Court, U.S.

FILED

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In The
Supreme Court of the United States
October Term, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.

THE BLACKFEET TRIBE OF THE
BLACKFEET RESERVATION, et al.,
Respondents.

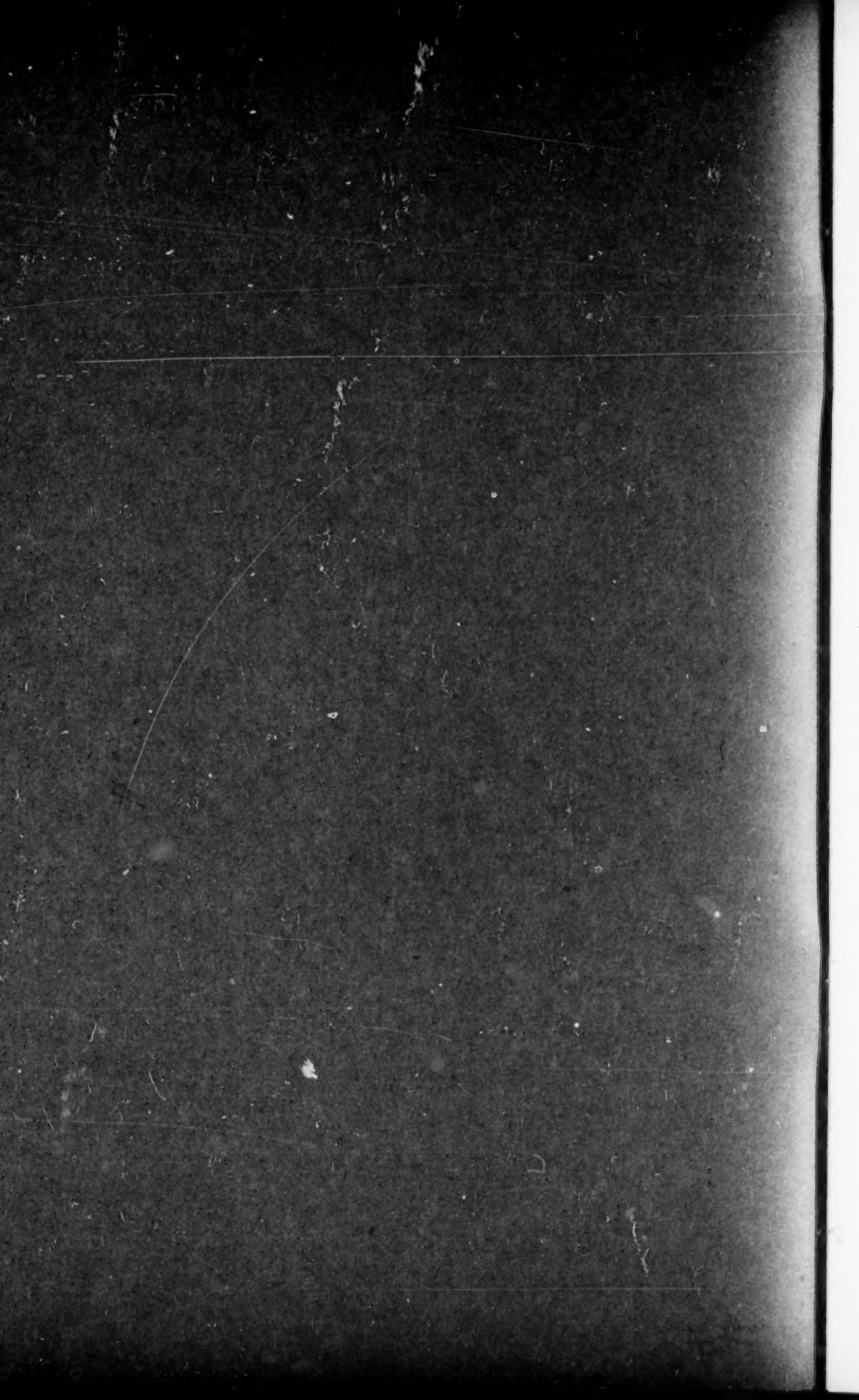
Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

JEANNE S. WHITEING
Counsel of Record
TOD J. SMITH
WHITEING & THOMPSON
1136 Pearl Street
Suite 203
Boulder, CO 80302
(303) 444-2549

DONALD G. KITTSOON
Blackfeet Legal Department
P.O. Box 849
Browning, MT 59417
(406) 338-7777

*Attorneys for Respondents
Blackfeet Tribe, et al.*



QUESTION PRESENTED

Whether Indian tribes may tax the activities of non-members on trust lands within the reservation?

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STATEMENT OF THE CASE

In 1986, the Blackfeet Tribe ("Tribe")¹ enacted a possessory interest tax in order to "provide members and nonmembers of the Tribe residing, doing business or working on the Blackfeet Reservation with essential governmental services." Blackfeet Ordinance 80-A, Section 1 (December 30, 1986).² The tax is applicable to Burlington Northern Railroad Company ("BN") and to other taxpayers including utilities, oil and gas pipelines and oil and gas well-site improvements. The Tribe also has levied oil and gas production taxes since 1985 and applies a business licensing tax.

Under the possessory interest tax, the Tribe taxes BN's property located on its 58.18 mile right-of-way across trust lands of the Blackfeet Reservation. The Reservation is located in northwestern Montana and is bordered on the west by Glacier National Park and on the north by the United States - Canada border. The Tribe's original Reservation, as established by Treaty of October 17, 1855, 11 Stat. 657, included a much larger territory encompassing most of northern Montana east of the Rocky Mountains. The Reservation was gradually

¹ The Blackfeet Tribe is a federally recognized Indian tribe organized as a constitutional government under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 987, 25 U.S.C. § 476.

² Ordinance 80-A is reprinted in its entirety in the Appendix to this Brief. Section 1 is found at App. 1. Petitioner reprints only portions of the Ordinance in Petitioner's Appendix at 63a-67a.

reduced in size by various Executive Orders and Acts of Congress.³

By agreements with the United States in 1886 and 1887, the Blackfeet Tribe and other Montana Indian tribes who were residing on the Blackfeet Reservation agreed to again reduce the size of the Blackfeet Indian Reservation, and to establish separate reservations for the various tribes. The agreements were ratified by Congress on May 1, 1888, 25 Stat. 113 ("1888 Act"). In Article VIII of the 1887 Blackfeet agreement, the Blackfeet Tribe agreed to allow rights-of-way across its Reservation for railroads, highways and telegraph lines whenever the President determined it was in the public interest.

It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

25 Stat. 113, 115-16.

³ See Executive Order of July 5, 1873, 1 Kappler 855; Act of April 15, 1874, 18 Stat. 28; Executive Order of April 13, 1875, 1 Kappler 856. This history of the Reservation is described in *British American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159, 162-63 (1936).

In 1890, Burlington Northern's predecessor applied for a right-of-way across the Blackfeet Reservation pursuant to Article VIII of the 1888 Act. President Benjamin Harrison approved the right-of-way on October 14, 1890. And, as required by the Act, the specific terms and conditions of the right-of-way were set out in a letter from the Commissioner of Indian Affairs to the Secretary of the Interior dated October 20, 1890, and approved by the Secretary with amendment on October 24, 1890.⁴

BN initiated its present challenge to the Tribe's possessory interest tax in 1987.⁵ In the proceedings below, BN focused its argument on showing that the Tribe's beneficial title to the lands comprising the right-of-way was extinguished, i.e., the land was no longer trust land, and therefore no longer within the taxing jurisdiction of the Tribe. *Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899 (1991); *Burlington Northern Railroad v. Fort Peck Tribal Executive Board, et al.*, 701 F.Supp. 1493 (D. Mt. 1988). The District Court and the Ninth Circuit Court of Appeals rejected BN's argument that the 1888 Act

⁴ The Act of February 15, 1887, 24 Stat. 402, reprinted in Petitioner's Appendix at 51a-53a, granted a right-of-way to BN's predecessor terminating at "the Great Falls of the Missouri River", just southeast of the Blackfeet Reservation. BN's predecessor subsequently applied for and was granted a right-of-way across the Blackfeet Reservation in 1890 pursuant to Article VIII of the 1888 Act as described above. The 1887 Act therefore has no application to the Blackfeet Tribe or the reduced Blackfeet Reservation.

⁵ BN chose to bypass the tax protest procedures provided for in the Tribe's tax ordinance. App. at 9-12. The procedure provides for a hearing before the Blackfeet Tax Protest Panel, with the right of appeal to the Blackfeet Tribal Court and the Blackfeet Court of Appeals.

extinguished the Tribe's title. Both Courts upheld the Tribe's tax under this Court's clear decisions in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), that Indian tribes have the power to tax nonmember transactions on trust lands. In this Court, BN does not challenge the lower courts' holding that the lands involved are trust lands, even though, as the District Court noted, it conceded the power of the Tribe to tax transactions involving non-Indians that occur on trust lands. *Burlington Northern v. Fort Peck*, 701 F.Supp. at 1496. BN raises no substantial reasons why this Court should grant certiorari to review an issue which it conceded in the courts below, and which has been ruled on definitively by this Court at least three times in recent years.

REASONS TO DENY THE WRIT

- I. **The Clear Decisions of This Court Support the Decision Below.**
 - A. **The Court's Precedents in Three Major Cases in the Last Eleven Years Uphold Tribal Authority to Tax Nonmember Activity on Trust Lands, the Issue Involved Here.**

The sole issue raised in the Petition is an issue that has been addressed and ruled on by this Court on at least three different occasions in the last eleven years. The issue is whether Indian tribes may tax the activities of non-Indians that take place on tribal lands within the reservation. Each time the Court has addressed this issue, it has upheld the tribes' authority to tax. The present case

is governed by these prior cases, as both courts below found when they relied on them to uphold the Blackfeet Tribe's authority to tax BN.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), this Court held that:

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. . . . [I]t derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. See, e.g., *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

That determination followed from the Court's holding two years earlier that tribes retained the authority to tax transactions occurring between Indians and non-Indians on trust land.

The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribe retains unless divested of it by federal law or necessary implication of their dependent status. Cf. *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978).

State of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980).

Only three years after *Merrion*, this Court upheld the right of the Navajo Tribe to impose the very tax the Blackfeet Tribe seeks to impose here, a possessory interest tax. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). The Navajo possessory interest tax is measured by the value of leasehold interests in tribal lands, and includes interests in railroad rights-of-way. In upholding the tax, the Court said:

The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs.

Id. at 201. Recently, this Court affirmed the continuing validity of *Colville*, *Merrion* and *Kerr-McGee* in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Thus, the power to tax nonmember activities on trust lands has been specifically upheld on three separate occasions by this Court since 1980, including, in particular, tribal authority to impose a possessory interest tax on such lands.

The decisions below specifically confirm that the property comprising BN's right-of-way is trust property.⁶

⁶ The lower court's rulings are consistent with this Court's previous construction of the 1888 Act as it applied to the Crow Tribe's title.

Whether these acts should be held to have granted a mere easement or a limited fee or some other limited interest in the land, [citations omitted]; *it is clear that it was not the purpose of Congress to extinguish the title*

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BN does not challenge that determination here. Petition for a Writ of Certiorari at 20 n.16, 21 ("Pet. at ____"). Instead, in this Court, BN attempts to establish that confusion and conflict exist in the application of the Court's precedents involving tribal taxation, but BN's thesis is not supportable.

B. No Confusion or Conflict Exists in the Area of Tribal Authority to Tax Nonmember Activity on Trust Lands.

As described above, over the last eleven years this Court's decisions in *Colville*, *Merrion*, and *Kerr-McGee* have upheld tribal authority to tax activities involving non-members on Indian lands. These cases are distinguishable from another line of cases involving tribal authority to regulate nonmember activities on *fee lands* within the reservation. *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). BN seeks to apply the fee land cases to the trust land issue in this case, but the cases themselves reject such application.

The Court's decisions in *Montana* and *Brendale* address a "narrow" regulatory issue, *Montana*, 450 U.S. at

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of the Indians in the land comprised within the right of way. To have excepted this strip from the reservation would have divided it in two; and would have rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to ensure.

United States v. Soldana, 246 U.S. 530, 532-33 (1918) (emphasis added).

557, not involved in the present case: An Indian tribe's power to regulate the activities of nonmembers when those activities occur on *fee lands*. The cases, therefore, establish a very different test from *Colville* and *Merrion*.

The test is premised on the Court's holding that neither Indian treaties nor principles of "inherent sovereignty" alone support tribal regulation on *fee lands*. *Montana*, 450 U.S. at 559, 563; *Brendale*, 492 U.S. at 422-23, 425-27. Nevertheless, the Court held that such authority may still exist.

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [Citations omitted.]

Montana, 450 U.S. at 565-66. See also *Duro v. Reina*, 110 S.Ct. 2053, 2061 (1990) ("It is true that our decisions recognize broader retained tribal powers outside the criminal context."). This is in contrast to the decisions in *Merrion* and *Colville* that "inherent sovereignty" in and of itself, and without further inquiry, supports taxation of

nonmember activities on *trust lands*. *Merrion*, 455 U.S. at 137; *Colville*, 447 U.S. at 152.

The Court's decisions have made clear the distinction between the two lines of cases. In *Montana*, the Court specifically acknowledges the distinction in upholding tribal hunting and fishing regulation on trust lands, but striking it down on fee lands.

The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe [citation omitted], and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. [Citation omitted.] What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

Montana, 450 U.S. at 557 (emphasis added). As to this latter issue, the Court concluded that neither the treaty involved nor inherent sovereignty supported tribal regulation, but set forth the test quoted above describing the circumstances when tribes may retain regulatory authority on fee lands.

The same distinction is noted by the plurality in *Brendale* in rejecting the applicability of *Colville* and confirming the application of *Montana* to the fee land regulatory issue before it:

As the opinion in *Colville* made clear, that case involved "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members." [Citation omitted.] It did

not involve the regulation of fee lands, as did Montana.

492 U.S. at 427 (emphasis added). *Brendale* involved the authority of the Yakima Tribe to zone *fee lands* within its reservation. As to these lands, the Court stated:

The inquiry thus becomes whether, and to what extent, the tribe has a protectable interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected.

Id. at 430.

Where trust lands are involved, that fact alone, establishes a protectable interest. The tribe's interest is most significant when the subject matter is the use of tribal land. In those cases, this Court has, without question, recognized the tribes' right to tax nonmembers' activities: "the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose". *Merrion*, 455 U.S. at 147. Indeed, this Court recently reaffirmed that property ownership provides a distinct foundation for tribal civil authority.

[T]his civil authority typically involves situations arising from property ownership within the reservation or "consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements." *Montana v. United States*, *supra*, 450 U.S. at 565.

Duro v. Reina, 110 U.S. at 2061 (emphasis added).⁷

⁷ The use of trust lands provides a strong tribal interest to tax BN in this case. BN has a substantial presence on the

Lower courts also have consistently recognized that an Indian tribe's "inherent sovereignty" over *trust lands* supports taxation of nonmember activities on those lands. On this issue, there is no conflict between the circuits or confusion in the application of this court's decisions. Compare *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983) (upholding application of a possessory interest and business activity tax to non-Indian holders of leases and rights-of-way over trust land) with *Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899 (1991) (upholding application of possessory interest tax to non-Indian holder of rights-of-way over trust land). Any *alleged* confusion over the scope of a tribe's inherent authority to tax transactions on *fee land*, see Pet. at 30, cannot be resolved by this Court within the context of this case.⁸

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Blackfeet Reservation. It operates its "main transcontinental rail line", Pet. at 3, on 58.18 miles of track across the Reservation, and maintains various buildings and other structures along its right-of-way. This main rail line crosses through the middle of the Reservation, passing through the town of Browning, the Tribal Headquarters, and through the town of East Glacier. Literally, hundreds of trains cross the Reservation on an annual basis.

⁸ Because this case deals only with taxation of BN's activities on trust lands, it has no implications for tribal taxation on fee lands. Although the Blackfeet tax applies to fee lands, the issue was not presented by the facts in this case and the Ninth Circuit did not rule on the validity of that aspect of the tax. As we have pointed out, that issue would be analyzed under the separate *Montana* and *Brendale* tests, and nothing in the decision below "foreshadows" the outcome of that analysis or sets a precedent for the fee land tax issue.

It is therefore not surprising that neither the Ninth Circuit nor the District Court discussed *Montana* or *Brendale*. Those cases address an issue which is not present in this case, i.e., the extent of tribal jurisdiction to regulate on *fee lands*.

C. A Consensual Relationship is Not Required to Tax Nonmember Activity on Trust Lands.

BN attempts to blur the clear distinction between the two lines of cases in order to set up a false conflict. It argues that the Court's case require a consensual relationship in order for the Blackfeet Tribe to tax BN's activities even on trust lands within the Blackfeet Reservation. The Court's cases, however, do not support application of this requirement to trust lands. To the contrary, the Court has made clear that because tribes possess *inherent sovereignty* to tax non-Indian activities on trust lands, the issue of consent has no relevance.⁹

Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority.

Merrion, 455 U.S. at 147.

Even if the Tribe's power to tax BN was dependent upon a consensual relationship, Article VIII of the 1888

⁹ Even though consent has no relevance to the exercise of the Tribe's sovereign authority over trust lands, we can think of no instance in which a nonmember could use trust land without the Tribe's or an individual Indian's consent.

Act created such a relationship. In Article VIII, the Black-foot Tribe "agreed" that a right-of-way "shall be, and is hereby, granted" for railroad purposes, among others. Clearly, the Tribe consented to BN's predecessor's right-of-way grant.¹⁰ Moreover, pertinent legislative history makes clear that the Tribe's consent to the railroad right-of-way was required. Bills introduced in the House and Senate in 1886 authorized railroad companies to obtain a right-of-way across the 1874 Act Reservation. See S.2281 introduced April 29, 1886, and H.R.8741 introduced May 10, 1886 (both 49th Cong. 1st Sess.). The bills passed both the House and the Senate, but were vetoed by President Cleveland for the specific reason that the Indians had not given their consent.

The bill is in the nature of a general right of way for railroads through this Indian reservation. ~~The~~ Indian occupants have not given their consent to it, neither have they been consulted regarding it, nor is there any provision in it for securing their consent or agreement to the location or construction of railroads upon their lands.

S.Rep. No. 1494, 49th Cong. 1st Sess. 6.

¹⁰ The Ninth Circuit also found consent to exist:

If a consensual relationship was necessary, the Tribe consented to railroad rights-of-way by joining Article VIII of the agreement ratified by the Act of 1888 and Burlington Northern chose to run rail lines through the Reservation by voluntarily applying for rights-of-way.

Burlington Northern, 924 F.2d at 904 n. 7.

The President further stated that he saw no "public exigencies" which required the legislation "which would affect so seriously the rights and interests of the Indians occupying the reservation." *Id.* The President also found that the legislation:

Ignores the right of the Indians to be consulted as to the disposition of their land . . . ; it gives the right to enter upon Indian lands to a class of corporations carrying with them many individuals not known for any scrupulous regard for the interest or welfare of the Indians.

Id. at 7. Congress did not override the President's veto.

Ultimately, the Blackfeet Tribe authorized railroad rights-of-way across the diminished Blackfeet Reservation in the 1887 agreement as ratified by the 1888 Act.¹¹ From the prior Congressional attempt in 1886 to authorize railroad rights-of-way across Blackfeet lands without tribal consent, it is clear that the 1888 Act railroad right-of-way provision was a measure meant to fully respect and fully protect the property rights and other rights of the Tribe, and specifically, the need to obtain tribal consent.¹²

¹¹ BN argues that the Tribe no longer has the power to exclude BN and, therefore, lacks the authority to tax. Pet. at 16 n.21, 20 n.16. In its agreement with the United States, the Tribe granted use of its lands for specific rights-of-way purposes, including railroads. Once BN ceases to use the right-of-way for the specific purpose granted, the Tribe no longer has an obligation to allow the use of trust land and can exercise its power to exclude. See *Merrion*, 455 U.S. at 144.

¹² BN apparently believes that the fact neither it nor its predecessor in interest negotiated directly with the Tribe somehow destroys the consensual nature of the Tribe's grant to the

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II. Neither the Ninth Circuit's Decision Nor the Court's Precedents Authorize Unrestricted or Discriminatory Taxes.

A. The Tribe's Taxing Authority is Subject to Federal Restrictions.

The tribal taxes involved in this case are not novel or unique. The State of Montana has been imposing similar taxes for years. *See* MONT. CODE ANN. §§ 15-23-201-202; §§ 15-23-301-303; 15-6-141(1)(iv); 15-6-145 (1991). *See also* Pet. 27. Other jurisdictions routinely impose such taxes. The Tribe's authority to impose such taxes is not unfettered or unchecked, however.

The Tribe's authority to tax is derived from its Constitution, which was approved by the Secretary of the Interior in 1935 under authority of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. §476. Article IV, section (1)(h) of the Blackfeet Constitution provides that the Tribal Council is empowered "to levy assessments for public purposes, provided that any assessments upon nonmembers trading or residing within the jurisdiction of the Tribe shall be subject to the approval of the Secretary of the Interior." Accordingly, the tax ordinance involved here was submitted for approval to the Area Director for the Billings Area Office of the Bureau of Indian Affairs, the Secretary's delegate, and the ordinance was approved on April 8, 1987.

Congress has mandated federal approval of the Tribe's Constitution, and the Blackfeet Constitution

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United States. *See* Pet. at 19-20. BN blithely ignores the fact that it is a third-party beneficiary of the agreement between the Tribe and the United States.

mandates federal approval of any taxes applied to nonmembers. Thus, unlike the situation of state taxation, both the Tribe's authority to tax nonmembers and the specific tax being challenged has been approved by the Federal Government.

This Court has noted the "series of federal checkpoints" established by Congress in reviewing tribal taxes.

Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax *will be consistent with national policies*.

Merrion, 455 U.S. at 141 (emphasis added).¹³ Therefore, before the Blackfeet Tribe could even begin to tax, both its Constitution and its tax were approved by the Federal Government. Even more than the interstate commerce clause, the federal approvals protect BN against any potential discriminatory tribal taxes. And, while the Tribe may not be constrained by the Fourteenth Amendment of the Constitution, it is constrained by the 1968 Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. §1302, which, like the Fourteenth Amendment, provides due process and equal protection guarantees to "any person".

¹³ Federal approval is not always required, however, in order for a tribal tax to be valid. *Kerr-McGee v. Navajo Tribe*, 471 U.S. 195 (1985).

BN took advantage of both the tribal and federal approval process. It appeared at a public meeting on the tax and submitted oral and written comments. It also appeared at a public meeting sponsored by the Bureau of Indian Affairs, held prior to the Bureau's approval of the tax.

The same federal checkpoints also insure that there is no conflict with any national policies involving railroads and other matters. Where there is a conflict with national policy, such as that alleged by BN, Pet. at 25-30, the appropriate forum to address that conflict is in Congress. Congress clearly has the authority to "alter the current scheme under which the tribes may impose taxes" *Merrion*, 455 U.S. at 156, if it concludes that such tax schemes conflict with overriding national efforts to revitalize the nation's railroads.

Moreover, BN has the same opportunity to lobby and influence the Blackfeet Tribal Council, the governing body of the Tribe, as it does any state legislature. Although BN does not vote in tribal elections any more than it votes in state elections, and even though it is in the same "captive" position as it is in the states through which it crosses, we have no doubt that BN has the ability to impact the tribal taxing process, just as it impacts the state taxing process.¹⁴

¹⁴ BN's ability to impact the tribal process has already been demonstrated. When BN appeared at the public hearings held on the Blackfeet tax, BN's comments specifically resulted in an amendment to the ordinance providing for an alternate independent appraisal method of valuation. BN also notes in its

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B. The Use of Tax Revenues is Restricted to Providing Services.

The Tribe's ordinance requires that tax revenues be used only "to defray the costs of providing governmental services on the Reservation". App. at 13. Thus, the revenues are dedicated only for the purpose of providing the "civilized society" and other services made available by the Tribe. BN benefits from the "civilized society" provided by tribal government, see *Cotton Petroleum v. New Mexico*, 490 U.S. at 189; *Commonwealth Edison v. Montana*, 453 U.S. 609, 614-629 (1981), and also has available to it numerous public services. Many of these services have been utilized when accidents, fires and other problems relating to BN's presence have occurred. Indeed, accidents regularly occur on the 58 miles of track running through the Reservation and the Tribe has been required to respond to these occurrences.

In short, BN is fully protected by federal and tribal law from discriminatory application of tribal taxes. Its claim of potential discrimination raises no issue which the Court should review.

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Petition at 6 n.4, that its tax liability under the Blackfeet and Fort Peck taxes was cut almost in half for the 1987 tax year and subsequent tax years. The reduction in taxes came about as a result of a reduction in Montana's valuation, which was accomplished through a negotiated agreement with the State. The Blackfeet Tribe subsequently agreed to the same reduction. BN then approached the Tribe to negotiate a Reservation property valuation separate and apart from the State's valuation method, and discussions were commenced for this purpose.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEANNE S. WHITEING
Counsel of Record
TOD J. SMITH
WHITEING & THOMPSON
1136 Pearl Street
Suite 203
Boulder, CO 80302
(303) 444-2549

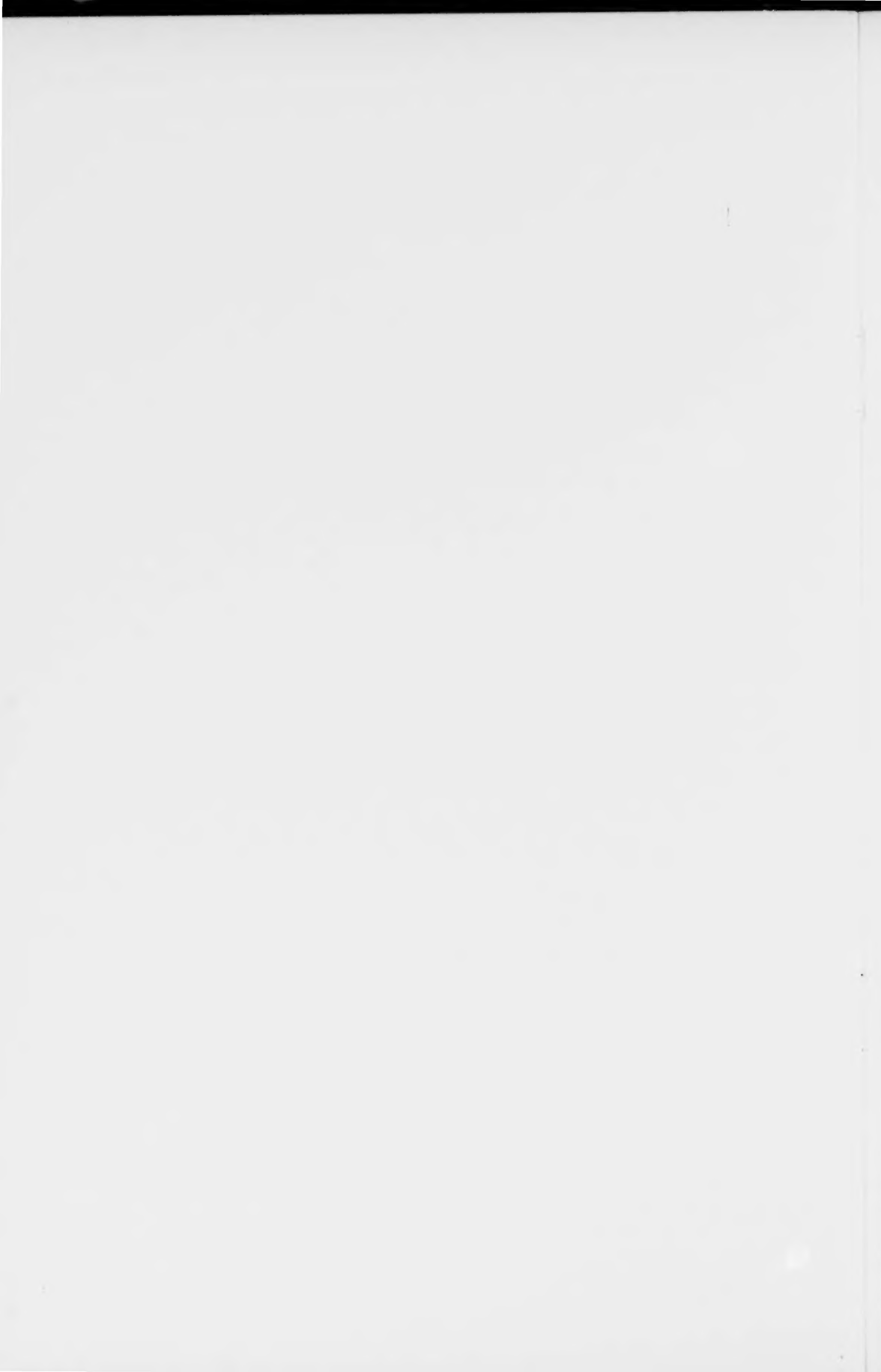
DONALD G. KITTSOON
BLACKFEET LEGAL DEPARTMENT
P.O. Box 849
Browning, MT 59417
(406) 338-777

*Attorneys for Respondents
Blackfeet Tribe, et al.*

November 4, 1991



APPENDIX A



App. 1

**THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN NATION
BLACKFEET TRIBAL ORDINANCE
PROVIDING FOR A
POSSESSORY INTEREST TAX**

NUMBER: 80

As Amended

By Resolution No. 213-87

Section 1. STATEMENT OF PURPOSE.

It is the policy of the Blackfeet Tribe to provide members and non-members of the Tribe residing, doing business or working within the Blackfeet Reservation with essential governmental services. To finance this governmental policy, the Blackfeet Tribe in this Ordinance adopts a possessory interest tax which will provide the Tribe with revenues necessary to fund essential governmental services within the Reservation boundaries which will benefit all individuals and businesses on the Reservation.

Section 2. TAX ADMINISTRATION DIVISION.

A Tax Administration Division of the Blackfeet Tribe is hereby established to administer this Ordinance and to keep all records and accounts concerning this tax. The Blackfeet Tribal Business Council shall from time to time designate an individual to be Director of said Tax Administration Division. Any inquiries concerning said tax shall be made through the Tax Administration Division of the Tribe.

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Section 3. DEFINITIONS.

Unless the context otherwise requires in this Ordinance, the following definitions shall apply:

(a) Tribe.

"Tribe" shall mean the Blackfeet Tribe of the Blackfeet Indian Reservation.

(b) Blackfeet Indian Reservation or Reservation.

"Blackfeet Indian Reservation" or "Reservation" shall mean all lands subject to the jurisdiction of the Blackfeet Tribe and includes any and all lands within the exterior boundaries of the Blackfeet Reservation, regardless of whether they are owned in fee, whether they be allotted or Tribal lands, or whether they be otherwise held.

(c) Chairman.

"Chairman" shall mean the Tribal Chairman of the Blackfeet Tribe.

(d) Superintendent.

"Superintendent" shall mean the Superintendent of the Blackfeet Agency, Bureau of Indian Affairs.

(e) Tribal Court

"Tribal Court" shall mean the Blackfeet Tribal Court as described in the Blackfeet Law and Order Code and does not include the Court of Appeals of the Blackfeet Tribe.

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(f) Court of Appeals.

"Court of Appeals" shall mean the Blackfeet Court of Appeals as described in the Blackfeet Law and Order Code.

(g) Taxable Person.

"Taxable Person" shall mean any person or entity, including any individual, partnership, corporation or other legal entity, having ownership rights in any possessory interest within the Blackfeet Indian Reservation.

(h) Possessory Interest.

"Possessory Interest" shall mean any non-exempt interest in real property within the exterior boundaries of the Blackfeet Indian Reservation, including the value of any property or improvements thereon. Examples of such interest include: (1) those held in fee (2) those held under lease (3) those held under permit (4) those held under an easement or right-of-way.

(i) Market Value.

"Market Value" is the value at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

(j) Commercial Business.

"Commercial Business" shall mean any person or entity organized primarily for the purpose of operating a retail sales or service business on the Reservation. Commercial Business as defined herein does not include a utility.

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(k) Utility.

"Utility" shall mean any privately or publicly held entity engaged in supplying, transmitting or distributing electricity, gas, water, telephone, telegraph or other communication services, or transportation services.

Section 4. RATE OF TAX.

The possessory interest tax set forth herein shall be assessed at the rate of four percent (4%) of the market value of the possessory interest as determined and computed in accordance with this Ordinance. Said rate of tax shall be and remain the same as herein established unless modified by an ordinance of the Blackfeet Tribal Business Council.

Section 5. COMPUTATION OF VALUE OF POSSESSORY INTEREST.

The value of a possessory interest shall be computed as provided in this section or by any other method adopted by the Tax Administration Division of the Tribe which accurately reflects the fair market value of the possessory interest which is subject to taxation.

(a) Date of Valuation.

All property that is subject to valuation under this Ordinance for all or any part of any tax year shall be valued as of October 1st of each year. Tax assessments for the following year shall be made based upon this value.

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(b) Method of Valuation.

The value of a possessory interest, including all property and improvements thereon, shall be 100% of market value, as that market value is stated on the assessment books of the county assessor for the county or counties in which the property is located, as apportioned to the Reservation, said apportionment being made on a mileage basis or on a per unit basis.

(c) Independent Appraisal Option.

As an alternative to accepting the market value of any possessory interest subject to the tax as being that market value stated in the assessment book of the county assessor for the county or counties in which the property is located, as apportioned to the Reservation, the Tax Administration Division may have the particular possessory interest assessed by a qualified independent appraiser when both the Tax Administration Division and the taxpayer holding the possessory interest agree in writing:

- (1) on a particular independent appraiser to do the appraisal;
- (2) that the taxpayer shall bear the costs of the independent appraisal;
- (3) to accept the results of the independent appraisal;
- (4) that the independent appraisal shall be completed by November 1st of the year preceding the tax year.

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Section 6. REPORTING REQUIREMENTS.

Each owner of a possessory interest shall comply with the following reporting requirements and such other requirements as are by rule or regulation adopted by the Tax Administration Division of the Tribe:

(a) Forms.

The Tax Administration Division shall provide forms for the reporting of all possessory interests to the Tribe for determination and assessment of tax due.

(b) Reporting Date.

Each taxpayer shall report the value of its possessory interests by November 15th of each year. Notice of tax assessment and tax due shall be mailed by the Tax administration Division by December 1st of each year, which tax shall be paid within thirty (30) days of the date of said notice, unless another date is specified by the Tax Administration Division. Taxes shall be due in advance based on the assessed valuation. Reporting dates for the 1987 Tax year only shall constitute exemptions to these usual reporting dates as follows: valuation information for the 1987 tax year shall be reported by taxpayers to the Tax Administration Division by May 1, 1987; notice of taxes assessed for 1987 shall be mailed to taxpayers by May 15, 1987; taxes for 1987 shall be due within 30 days of said notice.

(c) Extension of Time.

Upon timely written request to the Tax Administration Division, a taxpayer may request an extension of time within which to report the value of its possessory

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interests; and for good cause shown, the Tax Administration Division may extend, for a period not to exceed thirty (30) days, the valuation reporting due date, but no further extension shall be allowed. Such a request for extension, to be timely, must be received by the Tax Administration Division prior to the valuation reporting due date. Requests for extension received by the Tax Administration Division after the valuation reporting due date shall not be considered.

(d) Administrative Reports.

The Tax Administration Division shall report all activities and collections to the Blackfeet Tribal Business Council at least annually.

Section 7. EFFECTIVE DATE.

The effective date of this tax ordinance shall be January 1, 1987, with the initial full tax year being January 1, 1987 through December 31, 1987.

Section 8. PAYMENT OF TAXES DUE.

Any taxes assessed shall be paid to the Treasurer of the Blackfeet Tribe with reports being filed with the Tax Administration Division, as set forth herein. Payment will be considered to have been timely made if it is post-marked before midnight on the date on which the tax is due or if it is delivered to the Office of the Treasurer of the Blackfeet Tribe by certified mail or in person and a receipt is given before the due date.

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Section 9. TAX DECLARATION.

Every nonexempt taxable entity or person within the Reservation boundaries shall designate a natural person as the individual empowered by the taxable entity to serve on behalf of the taxable entity with respect to all matters involving this tax. Said designated natural person shall complete the forms distributed by the Tax Administration Division and provide the information required herein.

Section 10. PENALTY FOR LATE PAYMENT.

Any taxable entity or person failing to pay the amount of tax assessed by the due date shall pay a penalty on the outstanding balance in the amount of two percent (2%) per month of delay in making payment, pro rated to the actual date of receipt by the Tax Administration Division.

Section 11. EXEMPTIONS.

1. No possessory intent which consists of a service line of a utility which exclusively serves the Blackfeet Indian Reservation or of a delivery or distribution facility of a utility which exclusively serves the Blackfeet Indian Reservation shall be subject to this tax. Utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall be subject to this tax.

2. No possessory interest held by the United States, by the Blackfeet Tribe, by the State of Montana, or by

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counties, cities, towns or school districts within the State of Montana shall be subject to this tax.

3. No possessory interest in property which is used as a homesite, farm, or ranch whether held by or through an allotment or lease thereof, a Blackfeet tribal land assignment or lease, held in fee, or otherwise held, shall be subject to this tax.

Section 12. METHOD OF CLAIMING EXEMPTION.

A claim for exemption from taxation pursuant to Section 11 of this Ordinance shall be made at the time of the filing of valuation reporting information with the Tax Administration Division and shall be accompanied by a map clearly indicating the specific property for which exemption is claimed.

Section 13. APPEAL PROCEDURES FOR PROTESTED TAXES.

Any taxpayer may pay its tax under protest and request a refund of all or part thereof by filing a Notice of Protest with the Tax Administration Division of the Blackfeet Tribe at the time of payment. No refund shall be ordered except upon a protest filed within six months after the date when the protested tax would have become delinquent if the same had not been paid. All such protests shall be handled as follows:

(a) Any protest received shall be referred to a three-member Tax Protest Panel to be appointed by the Blackfeet Tribal Business Council from without the membership of the Blackfeet Tribal Business Council. The Tax

Protest Panel shall make a determination as to whether or not the protested tax shall be refunded and shall report its decision in writing to the protesting party, the Blackfeet Tribal Business Council, the Tribal Treasurer and the Director of the Tax Administration Division of the Tribe within five (5) working days of the date of determination of said protest. The Tax Protest Panel may seek any additional information or hold such hearings or meetings as it determines are necessary in such a manner (either formal or informal) as it determines is necessary. Additionally, said Tax Protest Panel may issue rules and regulations for the conduct of panel meetings and tax protest hearings. The decision of the Tax Protest Panel shall be final unless appealed to the Tribal Court in accordance with the provisions of this Ordinance.

(b) Appeal from a determination of the Tax Protest Panel may be made to the Tribal Court by filing a Notice of Appeal with the Clerk of the Tribal Court with copies to the Blackfeet Tribal Business Council, to the Director of the Tax Administration Division and to the Chairman of the Tax Protest Panel within fifteen (15) days of the date of the decision of the Tax Protest Panel. Upon receipt of an appeal from the Tax Protest Panel, the Court Clerk shall schedule a hearing before the Tribal Court at which time the protesting taxpayer shall be allowed to state the basis for the protest and be represented by counsel, at his own expense. The decision of the Tribal Court regarding the protest shall be made in writing and distributed to the protesting taxpayer or his counsel, the Director of the Tax Administration Division, the Tribal Treasurer, the Blackfeet Tribal Business Council and the Chairman of the Tax Protest Panel within five (5) working days of the date of

the decision. The decision of the Tribal Court shall be final unless appealed to the Court of Appeals as provided for herein.

(c) Appeals from the determination of the Tribal Court may be made to the Court of Appeals by filing a Notice of Appeal with the Clerk of the Tribal Court, with copies to the Blackfeet Tribal Business Council, the Treasurer of the Tribe, the Director of the Tax Administration Division and the Chairman of the Tax Protest Panel within fifteen days of the date of the decision of the Tribal Court. Upon the docketing of an appeal from the Tribal Court, an appellate briefing schedule and a time for oral argument shall be established pursuant to the appeals procedures established by the Blackfeet law and Order Code. The written decision of the Court of Appeals shall be distributed to the protesting taxpayer or his counsel, the Director of the Tax Administration Division, the Chairman of the Tax Protest Panel, the Treasurer of the Tribe, and the Blackfeet Tribal Business Council within five (5) working days of the date of decision. The decision of the Court of Appeals shall be final.

(d) No protest shall be heard unless the assessed taxes have first been paid by the taxpayer to the Treasurer of the Tribe within six months after the date when the taxes would have become delinquent. The Treasurer shall hold any contested amounts without expenditure in an interest bearing account, if possible, until a determination is made on the protest filed.

(e) If any tax is found to be erroneously or illegally collected, interest at the rate of four percent (4%) per

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annum shall be allowed on the amount erroneously or illegally collected.

(f) The taxpayer has the burden of proof to establish that the protested tax was erroneously or illegally collected.

Section 14. EXTENSION OF TIME FOR PAYING TAX.

Upon the filing with the Tax Administration Division of a timely request for an extension of time within which to pay assessed taxes, and upon a showing of good cause, the Tax Administration Division may extend, for a period not to exceed sixty (60) days, the due date for taxes assessed, but no further extension shall be allowed. Such a request for extension, to be timely, must be filed on or before the date the assessed taxes are due. The penalty for late payment as provided for in Section 10 of this Ordinance shall apply to any payment for which an extension has been granted as well as other late payments.

Section 15. COLLECTION POWERS.

The Tax Administration Division, in the name of the Tribe, shall have full power to collect taxes and penalties assessed, including the power to file suit in Tribal Court or in any other court of competent jurisdiction, and to execute on any judgment by all appropriate legal remedies including attachment and seizure of the assets of any taxpayer.

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Section 16. NO WAIVER OF SOVEREIGN IMMUNITY.

The Blackfeet Tribe does not in any way waive its sovereign immunity from suit to contest the validity of this Ordinance. The determination to refund all or part of a protested tax payment shall be made in accordance with the terms of this Ordinance. Any decision of the Tribal Court or the Court of Appeals on a protested tax payment or protested assessment made in accordance with Section 13 hereof shall be final.

Section 17. SEVERABILITY.

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

Section 18. USE OF TAX PROCEEDS.

All monies received shall be deposited by the Treasurer of the Tribe in the general fund to be budgeted by the Blackfeet Tribal Business Council and expended to defray the costs of providing governmental services on the Reservation. The Treasurer of the Tribe may execute vouchers against this fund to make refund adjustments, payments of interest or payments for any purpose for which this Ordinance may require. The Treasurer shall refund any taxes paid on which protests have been allowed, with interest as allowed by the Ordinance within thirty (30) days of the date of final decision.

Section 19. AMENDMENT.

This Ordinance may be amended by a majority vote of the Blackfeet Tribal Business Council. The Tax Administration Division shall notify taxpayers of any amendment.

BLACKFEET TRIBE OF
THE BLACKFEET INDIAN
RESERVATION

/s/ Archie St. Goddard, Acting
Earl Old Person, Chairman

ATTEST:

/s/ Marvin D. Weatherwax
Secretary

CERTIFICATION

I hereby certify that the foregoing Ordinance was adopted by the Blackfeet Tribal Business council in a duly called, noticed and convened Special session assembled for business on the 3rd day of March, 1987, with Six members present to constitute a quorum and by vote of Five members for and -0- members opposed, with one (1) member abstaining.

/s/ Marvin D. Weatherwax
Secretary Blackfeet
Tribal Business Council

OCT 31 1991

CLERK

**In The
Supreme Court of the United States**

October Term, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

**THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN
RESERVATION; BLACKFEET TRIBAL BUSINESS
COUNCIL; BLACKFEET TAX ADMINISTRATION
DIVISION; EARL OLD PERSON, CHAIRMAN; ARCHIE
ST. GODDARD, VICE CHAIRMAN; MARVIN
WEATHERWAX, SECRETARY; ELOUISE C. COBELL,
TREASURER; *et al.*,**

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF *AMICI CURIAE* STATES OF MONTANA,
CALIFORNIA, NORTH DAKOTA, SOUTH DAKOTA,
WASHINGTON AND UTAH IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Marc Racicot
Attorney General
Clay R. Smith*
Solicitor
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

(Additional counsel listed on inside cover.)

Daniel E. Lungren
Attorney General
State of California
Department of Justice
1515 K Street, Suite 511
Sacramento, California 95814
(916) 324-5437

Nicholas J. Spaeth
Attorney General
State of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505
(701) 224-2210

Mark Barnett
Attorney General
State of South Dakota
500 East Capitol
Pierre, South Dakota
57501-5070
(605) 773-3215

R. Paul Van Dam
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah
84114
(801) 538-1149

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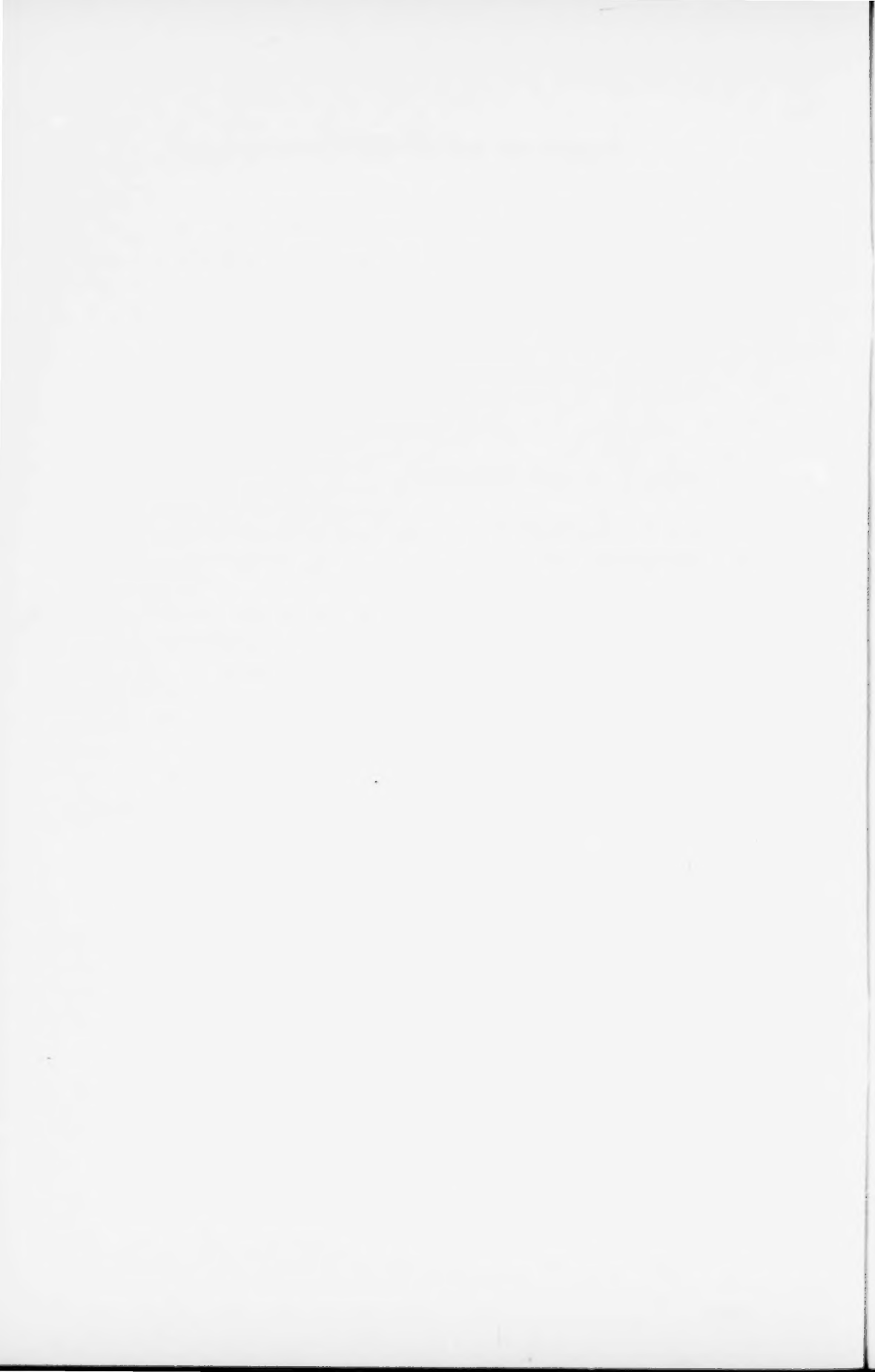
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The States of Montana, California, North Dakota, South Dakota, and Utah, through their respective Attorneys General, respectfully submit a brief *amicus curiae* pursuant to S. Ct. R. 37.5.



INTEREST OF *AMICI CURIAE* STATES

No area of Indian law has received more attention from the Court during the last 25 years than the authority of states and tribes to tax transactions occurring in Indian country. Whether the issue has been the taxing power of a state¹ or a tribe,² this area has proved "vexing."

¹*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905 (1991) (cigarette tax imposed on nonmember consumers); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (oil and gas tax imposed on nonmember lessee of tribe); *California State Bd. of Equal. v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam) (cigarette tax imposed on nonmember consumers); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (oil and gas taxes imposed on tribal royalty share); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) (gross receipts tax imposed on nonmember contractor of tribal school board); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (transaction privilege tax imposed on off-reservation retailer selling items to tribal corporation for on-reservation use); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (motor carrier license and use fuel taxes imposed on nonmember contractor of tribal corporation); *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134, 154-59 (1980) (cigarette taxes imposed on nonmember consumers); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (personal property tax imposed on tribal member); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (personal property tax and vender license fee imposed on indians; cigarette sales tax imposed on non-Indian consumers); *McClanahan v. Arizona State Tax*
(continued...)

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 138 (1980). The *amici* States have an obvious sovereign and fiscal interest when their own tax laws are at stake, but they also have an interest when tribal taxes are imposed on property or transactions simultaneously taxed under state law.³ Equally, if not more, important to the *amici* is the need to develop coherent principles for determining the scope of inherent tribal authority in taxation and other civil regulatory matters, since the extent of such authority can affect state

¹(...continued)

Comm'n, 411 U.S. 164 (1973) (income tax imposed on tribal member's reservation-based earnings); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) (gross income tax imposed on nonmember reservation retailer); see also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (gross receipts and use taxes imposed on off-reservation tribal ski resort).

²*Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (two business taxes imposed on nonmember corporation by a tribe not chartered under the Indian Reorganization Act); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (severance tax imposed on nonmember oil and gas lessee of tribe); *Colville*, 447 U.S. at 152-54 (cigarette taxes imposed on nonmember consumers).

³Concurrent, or "double," taxation is viewed by some in the public as unfair and a potential disincentive to reservation economic development. See *Northern Border Pipeline Co. v. State*, 722 P.2d 829, 837-38 (Mont. 1989) (Weber, J., specially concurring). *Northern Border Pipeline* upheld imposition of Montana *ad valorem* taxes against a utility's property simultaneously subject to the Assiniboine and Sioux Tribes' taxation ordinance at issue here. A comparable challenge by another utility was made with respect to property subject to the Blackfeet Tribe's taxation ordinance, was rejected by the state district court, and was not pursued on appeal. *Conoco Pipe Line Co. v. State*, No. DC-88-011 (Mont. 9th Jud. Dist., Glacier County).

regulatory jurisdiction in Indian country. See *Rice v. Rehner*, 463 U.S. 713, 719-20 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980). The present petition presents a valuable opportunity to continue the process, begun by the Court's modern decisions in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), of defining the inherent governmental authority of tribes over nonmembers.

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SUMMARY OF ARGUMENT

Justice Johnson, concurring in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1809), stated that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." This statement reflected the unique status of Indian tribes as "domestic dependent nations" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) and foreshadowed modern decisional principles governing determination of what inherent regulatory authority is retained by them. The watershed case for those principles is *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), where the Court held tribes without authority to prosecute non-Indians for reservation-based offenses. Since *Oliphant*, the Court has rendered seven opinions⁴

⁴*Duro v. Reina*, 110 S. Ct. 2053 (1990) (tribes lack inherent authority to prosecute nonmember Indians); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989) (tribes lack zoning authority with respect to nonmember lands in "open" area of their reservation but possess such authority (continued...))

concerned wholly or partly with the extent of retained inherent tribal authority, and it can fairly be said that the controlling doctrine is still unclear. Based upon the plurality opinion in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), however, one can say what that doctrine should be: Tribes lack inherent regulatory authority over nonmembers, at least for taxation purposes, unless the latter have either expressly or impliedly consented to tribal governance.

The Court of Appeals' decision below will likely add to the doctrinal confusion attendant to determining the scope of inherent tribal authority generally and, more specifically, with respect to taxation issues. It thus deemed consent irrelevant to the necessary inquiry and, instead, posed as the dispositive inquiry "whether [petitioner] receives benefits from the Tribes for which it may be taxed." *Burlington Northern Railroad Company v. Blackfeet*

⁴(...continued)

as to nonmember lands in "closed" area); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (tribe possessed inherent authority to impose business taxes on nonmember corporation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribe possessed inherent authority to impose severance tax on nonmember oil and gas producer-lessee); *Montana v. United States*, 450 U.S. 544 (1981) (tribe lacked inherent authority to regulate nonmember hunting and fishing occurring on nonmember lands); *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134 (1980) (tribes possessed inherent authority to impose cigarette taxes on nonmember consumers); *United States v. Wheeler*, 435 U.S. 313 (1978) (tribal criminal prosecution of member for reservation offense constituted exercise of retained inherent authority, not congressionally-delegated authority, and therefore did not preclude the federal government under the Double Jeopardy Clause from prosecuting member for same conduct).

Tribe, 924 F.2d 899, 904 (9th Cir. 1991); Pet. 1a, 11a. Although nominally predicated on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court of Appeals' reasoning not only departs from the very logic of that case but also ignores the significance of other decisions by this Court exploring the limits of retained tribal authority over nonmembers. The questions presented here accordingly invite the Court to refine further the standards by which lower courts should measure the reach of inherent tribal powers and to make explicit what is now implicit -- that those standards apply regardless of the particular regulatory context at hand.

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ARGUMENT

1. The question of inherent tribal authority over nonmembers has arisen in three broad contexts: criminal jurisdiction, taxation jurisdiction, and general civil regulatory jurisdiction. Despite the differing nature of the involved regulation, however, the doctrinal standards informing the analysis in each context have been largely common. The precise nature of those standards nonetheless remains in doubt although, viewed as a whole, the court's reasoning indicates that inherent tribal authority over nonmembers for taxation purposes is rooted in the express or implied consent of the latter.

(a) In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court refused to find inherent tribal authority to prosecute two non-Indians charged with misdemeanor violations in tribal court. Rejecting the tribe's claim that the prosecutions were an appropriate exercise of its "'retained inherent powers of government'" (*id.* at 196), the Court gave "considerable weight" to "the commonly shared presumption of Congress, the Executive

Branch, and lower courts that tribal courts do not have the power to try non-Indians" (*id.* at 205) and reasoned "tribes are prohibited from exercising both those powers that are expressly terminated by Congress and those powers 'inconsistent with their status[]'" (*id.* at 208) (emphasis in original). The Court viewed the exercise of criminal jurisdiction over non-Indians as inconsistent with the United States' "solicitude that its citizens be protected ... from unwarranted intrusions on their personal liberty" and concluded that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes ... necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. Shortly after *Oliphant*, the Court decided *United States v. Wheeler*, 435 U.S. 313 (1978), holding that a tribe maintained inherent authority to prosecute members for reservation-based crimes. It stated that "[t]he areas in which ... implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe" and that "the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type [since] [they] involve only the relations among members of a tribe." *Id.* at 326. The Court therefore concluded that the tribe's prosecution did not bar the federal government from proceeding against the member on the basis of the same conduct, since the prosecutions were the acts of different sovereigns. *Id.* at 328.

The Court extended the reasoning of *Oliphant* and *Wheeler* in *Duro v. Reina*, 110 S. Ct. 2053 (1990), where it determined a tribe lacked inherent authority to prosecute nonmember Indians. It stated that "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique

customs and social order." *Id.* at 2060. The Court nonetheless did not rely exclusively on *Oliphant* and *Wheeler* for its conclusion that nonmember Indians were situated no differently than non-Indians for criminal jurisdiction purposes, observing that "[t]he distinction between members and nonmembers and its relation to self-governance is recognized in other areas of Indian law." It then noted the statement in *Montana v. United States*, 450 U.S. 544, 565 (1981), that *Oliphant's* "'principles ... support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe'" (110 S. Ct. at 2061) and said that, while tribal civil regulatory jurisdiction over nonmembers may sometimes be present, "this civil authority typically involves situations arising from property ownership within the reservation or 'consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements'" (*id.* (quoting from *Montana*, 450 U.S. at 565)). The reference to "property ownership within the reservation" was to *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and, presumably, to that portion of the earlier decision finding zoning authority over nonmember lands within the "closed" area of the Yakima Reservation.

(b) The Court first addressed the issue of a tribe's inherent authority to tax nonmembers in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). Several tribes there imposed a tax on cigarettes marketed through reservation retailers, whose incidence fell on the ultimate consumer. *Id.* at 144. The Court rejected the claim that the tribes lacked authority to require tax payments by nonmember consumers, stating that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is

a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152. It thereafter quoted with approval from 55 I.D. 14, 46 (1934), for the proposition that taxation "'power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.'" 447 U.S. at 153 (emphasis added by Court). The Court's favorable reference to the arguably broad language of Solicitor Margold's opinion nonetheless cannot be divorced from the nature of the relationship at issue in the case -- consensual commercial transactions between tribes and nonmembers where, as a condition of buying cigarettes, the nonmembers paid a tribal tax.

Two years later in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court upheld a tribal severance tax imposed on nonmember lessees extracting oil and gas from reservation trust lands pursuant to leases under the Omnibus Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g. The principal issue was the dissent's assertion that the sole basis for the tribe's inherent power to tax resided in its right to exclude nonmembers from tribal lands, a right the dissenting justices believed had been forfeited by entering into the lease arrangements prior to adoption of the challenged tax. *Id.* at 160, 186-87 (Stevens, J., dissenting). A majority of the Court disagreed, relying on *Colville* and several earlier cases for the proposition that

a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may

exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.

Id. at 141-42.⁵ Defining the exact scope of "tribal

⁵The earlier cases discussed by the majority concerned the Creek and Chickasaw Tribes. In *Morris v. Hitchcock*, 194 U.S. 384 (1904), the Court upheld a Chickasaw privilege tax imposed on nonmember owners of cattle and horses grazing on trust allotment lands within the tribe's territory. The holding was predicated on various treaties pursuant to which "the Chickasaw Nation ha[d] exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." *Id.* at 389. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), involved a Creek tax imposed upon nonmembers trading within the tribe's territory. Unlike this Court in *Morris*, the court of appeals did rely on the tribe's inherent powers as the basis for sustaining the tax:

The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself, or by the superior power of the republic it is taken from it.

Id. at 950. The court then reviewed pertinent treaties and statutes, including an 1898 act which had provided for the sale of townsites to nonmembers, and found no divestiture of this inherent power. *Id.* at 951-54. It cited favorably 23 Op. Att'y Gen. 214 (1900) which concluded that nonmembers doing business on fee lands
(continued...)

jurisdiction" was not essential in *Merrion*, since not only were the affected leases on trust property but they were also the result of consensual transactions with the tribe. *Accord Kerr-McGee Corporation v. Navajo Tribe*, 471 U.S. 195 (1985).

(c) The importance of express or implied consent as a predicate for the exercise of inherent tribal authority over nonmembers is reflected in the general civil regulatory cases: *Montana* and *Brendale*. The Court stated in *Montana*, which arose from a tribe's attempt to regulate non-Indian hunting and fishing on non-Indian fee lands, that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. It then said that, while *Oliphant* and its principles generally established

⁵(...continued)

were subject to tribal taxation since "[t]hese laws requiring a permit to reside or carry on business in the Indian country existed long before and at the time [the 1898] act was passed" and that "if any outsider saw it proper to purchase a town lot under this act of Congress, he did so with full knowledge that he could occupy it for residence or business only by permission from the Indians." *Id.* at 217. The last decision, *Maxey v. Wright*, 54 S.W. 807 (Ind. Terr.), *aff'd mem.*, 105 F. 1003 (8th Cir. 1900), was a challenge brought by various attorneys to a Creek tax imposed on nonmembers practicing law in the tribe's territory. The court sustained a demurrer to the complaint, finding that the tribe "carefully guarded" in an 1856 treaty its "sovereignty, and [its] right to admit, and consequently exclude, all white persons, except such as are named in the treaty." *Id.* at 809. *Morris* and *Maxey*, therefore, did not address the inherent authority issue, while the plaintiffs in *Buster* had knowledge of and, as reasoned in the Attorney General's opinion, impliedly consented to the business tax when they purchased their townsites.

a tribe's inherent powers did not encompass nonmember activity, there were two possible exceptions:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, [358 U.S. 217, 233 (1959)]; *Morris v. Hitchcock*, 194 U.S. 384; *Buster v. Wright*, 135 F. 947, 950 (CA8); see *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66. The Court rejected application of either exception, since "[n]on-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction"⁶ and "[t]he complaint in the

⁶The Court had earlier construed the 1868 Fort Laramie Treaty, 15 Stat. 649 (1868), as conferring on the Crow Tribe the authority to control hunting and fishing only on those lands where it "exercises 'absolute and undisturbed use and occupation.'" 450 U.S. at 559. The quantity of such lands, however, "was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887 ... (continued...)"

District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe." *Id.* at 566.

While the absence of a majority opinion in *Brendale* reflects disagreement over the precise standards applicable to determining the extent of inherent tribal civil regulatory jurisdiction, the plurality opinion's reasoning represents what the *amici* States believe is most consistent with prior decisions. That opinion held in a zoning context that, absent consent, tribes do not possess regulatory jurisdiction over activities of nonmembers on the latter's own lands. Application of the second *Montana* exception was deemed to "make little sense" in such circumstances because tribal zoning authority "would last only so long as the threatening use continued" and "zoning authority could vest variously in the county and the Tribe, switching back and forth between the two, depending on what uses the county permitted on the fee land at issue." 492 U.S. at 429-30. The plurality opinion therefore held that "the governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land" and that, if a tribe's political integrity, economic security, or health and welfare was demonstrably imperiled by a particular use of nonmember land, the tribe should pursue available state or federal administrative and judicial remedies. *Id.* at 430-31. At least where land-use practices are involved, the *Brendale* plurality opinion indicates that tribal civil regulatory jurisdiction can be premised only on consent.

⁶(...continued)

and the Crow Allotment Act of 1920[.]" *Id.* The Court dismissed as "def[y]ing] common sense" any suggestion that non-Indians "who would settle upon alienated allotted lands would be subject to tribal regulatory authority." *Id.* at 560 n.9.

2. The underlying issue presented by the petition is whether the court should make clear the principle that inherent tribal authority for taxation, if not all, purposes over nonmembers must be grounded in express or implied consent. See *Duro*, 110 S. Ct. at 2064 ("With respect to [their] internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. ... This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system") (citations omitted). The evolution of the Court's reasoning from *Oliphant* to the plurality opinion in *Brendale* suggests this conclusion is inescapable. It is nonetheless an evolution which was not appreciated by the Court of Appeals.

There is no question that the petitioner's use of the rights-of-way through the Fort Peck and Blackfeet Reservations is unrelated to any consensual relationship with either the Assiniboiné and Sioux Tribes or the Blackfeet Tribe. The rights-of-way were acquired from the United States through statute and presidential directive, with the tribes explicitly agreeing that the Secretary of the Interior, not themselves, would establish "such rules, regulations, limitations, and restrictions" as necessary and the "compensation" for the land taken. Act of May 1, 1888, art. VIII, 25 Stat. 113, 115-16; Pet. 54a. Under these circumstances, the Court of Appeals' lengthy discussion concerning whether the rights-of-way "extinguish[ed] the Tribes' title" (924 F.2d at 902 n.5; Pet. 7a n.5) adds little, if anything, to the required substantive analysis since, whatever the precise nature of the tribal property interest, it is insufficient to preserve a claim to inherent regulatory jurisdiction over property whose use and control, as well as cost, for right-of-way purposes had

been expressly retained by the federal government. *Cf. Thomas v. Gay*, 169 U.S. 264, 273 (1898) (indicating by analogy that Arizona and Idaho tribes' interest in railroad rights-of-way was too insubstantial to affect territories' taxation authority).

The Court of Appeals effectively conceded the absence of a consensual basis for the Tribes' taxing authority and instead framed the question as "whether Burlington Northern receives benefits from the Tribes for which it may be taxed[.]" thereby creating a *third* exception to the presumption that tribes lack inherent regulatory power over nonmembers applicable only in taxation matters. 924 F.2d at 904; Pet. 11a.⁷ In *Merrion*, the Court did state "Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services" (455 U.S. at 140), but this statement cannot be isolated from the more general proposition that "the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction" (*id.* at 142). Consequently, unless mere receipt of tribal services, whether solicited or not, constitutes entering "tribal jurisdiction," the Court of Appeals' analysis begs the question. Crediting that analysis would mean that tribes possess taxation authority over all reservation residents

⁷Although the availability of the second *Montana* exception is problematic under the *Brendale* plurality opinion in any context, it could at most sanction regulatory jurisdiction of a nature essential to ameliorating nonmember "conduct" which "threatens or has some direct effect" on the enumerated interests. Taxing jurisdiction plainly cannot serve such a function. This conclusion is also implicit in *Montana* itself, which referred to *Colville*, *Morris* and *Buster* as representative of instances where the first, or consent, exception has been recognized. The Court of Appeals did not rely on the second exception.

since a claim can be plausibly made that, directly or indirectly, at least some minimal benefit accrues to them through tribal governmental activities. Such a broad application of the inherent authority doctrine would render tribal taxing power *sui generis* -- a result seemingly at odds with this Court's attempts to measure the reach of that doctrine against a common set of standards.

In sum, the Court of Appeals' decision presents an opportunity to define further the extent to which tribes have civil regulatory jurisdiction over nonmembers. Not only can the Court resolve the practical difficulties faced by lower courts in applying the inconsistent analytical approaches articulated in *Brendale*, but it also can clarify whether the standards ordinarily applied in determining the existence of inherent tribal authority over nonmembers extend to taxation. The questions presented by the petition thus have quite general importance to the development of coherent principles for structuring the relationships among states, tribes, and individual citizens.



CONCLUSION

The *amici curiae* States respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

MARC RACICOT
Attorney General
CLAY R. SMITH*
Solicitor
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

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No. 91-545

IN THE
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OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
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THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RES-
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BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD
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MAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C.
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and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION, ASSINIBOINE & SIOUX TRIBES OF THE
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
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Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE
ASSOCIATION OF AMERICAN RAILROADS
IN SUPPORT OF PETITIONER

ROBERT W. BLANCHETTE
KENNETH P. KOLSON *
ASSOCIATION OF AMERICAN
RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

*Counsel for Amicus Curiae
Association of American
Railroads*

November 1, 1991

* Counsel of Record

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TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/
ACCOUNTANT, *Respondents.*

On Petition for a Writ of Certiorari to the
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for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of American Railroads ("AAR") re-
spectfully requests leave to file the attached brief *amicus*
curiae in support of the petition for certiorari in this
case. Petitioner has consented to the filing of the brief.
Counsel for Respondents Blackfeet Tribe and Fort Peck
Tribal Executive Board have withheld consent.

AAR is a non-profit trade association representing the Nation's major railroads. Its members account for approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. It has frequently filed *amicus curiae* briefs in cases before this Court that present issues of widespread importance to its members.*

The decision below will have a serious adverse effect on the railroad industry as a whole. In the case for which certiorari is sought, the Ninth Circuit upheld property taxes imposed by the Blackfeet and Assiniboine and Sioux Tribes ("Tribes") on the Burlington Northern Railroad's federally-granted rights-of-way through the Blackfeet and Fort Peck Indian Reservations. In upholding the challenged taxes, the Ninth Circuit rejected the railroad's argument, predicated on this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), that tribal authorities lacked authority to impose taxes on nonmembers in the absence of a "consensual relationship" between the tribe and the nonmember.

If the decision of the Ninth Circuit is not overturned, the railroad industry as a whole, and not just the specific railroad litigant before this Court, will be subjected to unlawful and extensive tribal taxation of federally-granted rights of way across Indian reservations. Many of the Nation's railroads cross reservation lands. The

* See *Southern Pacific Transportation Co. v. Jose Hernandez*, No. 91-293 (filed September 18, 1991); *Transportes Aereos Mercantiles Pan Americanos, S.A. v. International Association of Machinists and Aerospace Workers, et al.*, No. 91-02 (filed August 30, 1991); *Norfolk and Western Railway Company v. Olen Roberson*, No. 90-1271 (filed April 19, 1991); *Burlington Northern R.R. v. Oklahoma Tax Com'n*, 481 U.S. 454 (1987); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 450 U.S. 336 (1982); *Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980).

prospect of tribal taxation is of grave concern to the industry because railroads have no voice in tribal government and no ability to remove themselves from a reservation without Federal authorization. As the representative of the nation's railroads, AAR is in a position to convey their concern with this decision and to present industry-wide factual information which will assist the Court in understanding the broad implications of the decision below. For the foregoing reasons, AAR respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for certiorari be granted.

Respectfully submitted,

ROBERT W. BLANCHETTE
KENNETH P. KOLSON *
ASSOCIATION OF AMERICAN
RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511
Counsel for Amicus Curiae
Association of American
Railroads

November 1, 1991

* Counsel of Record



QUESTIONS PRESENTED

1. Whether, in the absence of express congressional authorization, Indian tribes lack the power to tax nonmembers with whom the tribes have no consensual relationship.

2. Whether Indian tribes lack the power to tax the rights-of-way of nonmembers engaged in interstate commerce, where the rights-of-way were granted by the federal government and any discontinuance of their use is subject to exclusive federal regulatory determination.



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INTEREST OF AMICUS CURIAE

The Association of American Railroads ("AAR") is a nonprofit trade association representing the Nation's major railroads. Its members account for approximately

85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern.

AAR seeks to participate here because Tribal taxation of railroad rights-of-way is a serious and growing problem for the railroad industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Ninth Circuit opens the door to a new, and highly burdensome, tier of taxes on the Nation's railroads. It permits tribal taxation of interstate carriers who have no voice in tribal government, on the basis of railroad rights-of-way that were granted, not by the tribes themselves, but by the Federal Government. This holding paves the way for the tribes to extract revenues from a captive industry that is precluded from removing itself from the reservation without Federal authorization.

At least 55 Indian reservations are crossed by one or more railroads pursuant to rights-of-way granted by the Federal Government. Federal rights-of-way across Indian reservations provided essential links for the creation and completion of this Nation's interstate rail system in the nineteenth and early twentieth centuries. Those rights-of-way generally establish the present configuration of the Nation's interstate rail network and remain of undiminished importance to the flow of interstate rail commerce to the present day.

For over a century, railroads provided interstate transportation across Indian reservations essentially unhindered by efforts of local Indian tribes to impose taxes. Commencing in the mid-1980's, however, tribal authorities seeking additional revenues have increasingly looked to the rights-of-way of interstate railroads located within the boundaries of their reservations (as well as to other interstate

utility property on the reservation). Railroad rights-of-way are viewed as attractive subjects of tribal taxation because they are extremely unlikely to be removed from the reservation (and would require prior Federal regulatory approval to do so), are of significant value, and provide a basis for taxation the incidence of which falls wholly on interstate railroads (and other "off-reservation" interests) rather than on local residents. As such, federally-granted railroad rights-of-way across reservation lands are "sitting ducks" for tribal taxation efforts in the absence of definitive legal constraints on tribal taxation authority over nonmembers.

In the case at bar, the Court of Appeals for the Ninth Circuit upheld, as against railroad challenge, the authority of the Blackfeet and Assiniboine and Sioux Tribes ("Tribes") to impose, respectively, "possessory interest"¹ and "utility property"² taxes on Burlington Northern Railroad's federally-granted rights-of-way through the Blackfeet and Fort Peck Indian reservations. The Ninth Circuit relied on general language in this Court's decisions in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and *Merion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), to conclude that Indian tribes retain broad authority "to tax the activities or property of non-Indians taking place or situated on Indian land in cases where the tribe has a significant interest in the subject matter." Pet. App. at 10a (quoting *Colville*, 447 U.S. at 153). The court found that the Tribes have a "significant interest" with respect to the challenged taxes "because Burlington's activities involve use of tribal lands and because Burlington is the recipient of tribal services." *Id.*

The Ninth Circuit summarily rejected the argument of Burlington Northern, squarely predicated on this Court's

¹ Blackfeet Ord. 80 (1987).

² XVIII Ft. Peck Comp. Code §§ 301-324 (1987).

decision in *Montana v. United States*, 450 U.S. 544 (1981), that the inherent authority of the tribe did not generally extend to Burlington Northern as a nonmember, and that in the absence of a *consensual relationship* between Burlington Northern and the Tribes with respect to Burlington Northern's presence and activities on the reservation, the Tribes lacked the authority to impose taxes on Burlington Northern's rights-of-way. The lower court stated: "The relevant question is not whether Burlington Northern's activities on the reservation were consensual or subject to control by the Tribes, but whether Burlington Northern receives benefits from the Tribes for which it may be taxed." Pet. App. at 11a.

The decision of the court below represents an improper construction of the scope of retained tribal authority with respect to taxation of non-Indians who have not entered into consensual relationships with the tribe. It ignores applicable precedent of this Court effectively incorporating a consensual relationship as a pre-condition of tribal taxation of non-members. Moreover, the decision below has the potential to inflict serious economic harm on the railroad industry. It emanates from the Circuit Court of Appeals with the most widespread jurisdiction over Indian affairs (including a majority of the Nation's Indian reservations) and provides judicial sanction for essentially unlimited tribal taxation of federally-granted railroad rights-of-way. Because the decision below raises important issues of Indian taxation authority over nonmembers—relevant not only to railroads but to other non-Indians lawfully on reservation lands—and because those issues can only be definitively resolved by this Court, this Court's review of the decision below is essential.

ARGUMENT

I. THE DECISION BELOW, IF ALLOWED TO STAND, WILL INFLICT SERIOUS ECONOMIC INJURY ON THE RAILROAD INDUSTRY

The Ninth Circuit's decision is likely to serve as the catalyst for massive tribal taxation of railroad rights-of-way. Railroads are the ideal target for such taxes—immovable, nonresident, interstate businesses. They have no voice in tribal government. In the absence of a "consensual relationship" requirement, there is *no* effective constraint that would prevent unlimited and discriminatory taxation of railroad rights-of-way by tribal authorities. As a result, railroads—whose rights-of-way are already taxed by state and local governments—are facing a new layer of taxes from tribal governments.

The problem has become increasingly grave since the issuance of the district court decision in this case. Information provided by just a few of AAR's Class I member rail carriers shows an alarming trend. Four of the largest carriers³ are currently subject to taxation by Indian tribes. Taxes have been imposed on their rights-of-way by tribes all over the west, in Montana, North Dakota, New Mexico, Arizona, Nevada, and Idaho. Some railroads are taxed by more than one tribe in the same state. For example, the Atchison, Topeka and Santa Fe is taxed by seven tribes in one state (New Mexico). *See app. at 1a.*

The potential for additional tribal taxation is significant. The nation's rail carriers cross reservations of many tribes that have not yet imposed a tax. *See app. at 1a-3a.* Burlington Northern has over 100 miles of track in each of four reservations—Nez-Perce, Cherokee, Chickasaw and Creek—where it is not yet taxed.

³ The Atchison, Topeka and Santa Fe Railway Company (13 states); Burlington Northern Railroad Company (22 states); the Soo Line Railroad Company (9 states); and the Union Pacific Railroad Company (13 states).

For the most part, these are the roads' main lines; they cannot be abandoned.

Tribal taxes on possessory interests are disturbingly discriminatory. These taxes typically fall on railroads and other interstate utilities while exempting utilities that exclusively serve the reservation. It is not unusual for these taxes to exempt the tribes and other governmental entities as well. Nor is the tax inconsequential; it currently ranges from 2 to 7 percent of the value of the possessory interest. Finally, nearly half of these taxes were adopted in the past three years, since the issuance of the district court opinion upholding the taxes in this case. *See app. at 4a-7a.*⁴

Discriminatory taxation is not a new phenomenon for the railroad industry. Historically, state and local tax authorities often sought to obtain a disproportionate share of their tax revenues through excessive and discriminatory taxation of railroad property. As Congress noted in enacting the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), which sought to address this problem,⁵ railroads "are easy prey" for state and local tax authorities because they are "nonvoting, often nonresident targets for local taxation, and cannot easily remove their right-of-way and terminals." S. Rep.

⁴ The chart appearing at app. 4a-7a was compiled principally from material obtained through Freedom of Information Act requests to the various Area Offices of the Bureau of Indian Affairs. The listing is incomplete; no response was received from the Aberdeen, South Dakota, Area Office, and the Muskogee, Oklahoma, Area Office withheld the requested information claiming an exemption from disclosure. In addition, the requests were limited to tax ordinances and resolutions submitted for approval during the past five years.

⁵ Section 306 of the 4-R Act, codified at 49 U.S.C. § 11503, requires state and local tax authorities to assess and tax railroad property at the same level generally applicable to other commercial and industrial property in the tax jurisdiction and to refrain from imposition of any other discriminatory tax on railroads. *See Burlington Northern Railroad v. Oklahoma Tax Commission*, 481 U.S. 454 (1987).

No. 630, 91st Cong., 1st Sess. 3 (1969). As Congress further found, the effects of discriminatory state and local taxation upon the railroad industry had been massive and persistent, and had operated to seriously weaken the National Transportation System.⁶

The exposure of railroads to excessive and discriminatory taxation is likely to be even more pronounced at the tribal level. Not only are railroad rights-of-way essentially stationary and defenseless targets for taxation efforts, but with respect to Indian tribes there appear to be no effective legal limitations on the arbitrary exercise of taxation authority. State and local governments, even in the absence of the 4-R Act limitations, are precluded from imposing taxes solely on non-voting, non-residents of the taxing jurisdiction by the requirements of the Equal Protection Clause of the Fourteenth Amendment, *see, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), and the non-discrimination requirements of the Interstate Commerce Clause, *see, e.g., American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). Tribal taxing authorities, however, are not similarly constrained by these constitutional limitations. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 & n.7 (1978); *Duro v. Reina*, 110 S. Ct. 2053, 2064 (1990); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).⁷

⁶ *See, e.g.,* S. Rep. No. 630, at 3-8. The Senate Report found that over the previous nine year period the railroad industry had been assessed more than \$900 million in discriminatory state and local property taxes. *Id.* at 3.

⁷ Moreover, Federal statutes impose no specific limitations or constraints on the scope of retained Indian tribal taxation authority in those circumstances where it may be exercised over nonmembers. Although the taxes in the instant case were submitted by the Tribes to the Secretary of the Interior, Bureau of Indian Affairs, for prior approval (Pet. App. at 18a, 40a), there is no general requirement that tribal officials seek prior Executive Department approval for specific tax provisions they may adopt applicable to non-members. As this Court held in *Kerr-McGee Corp. v. Navajo Tribe of In-*

In sum, railroads have always been tempting targets for excessive taxation by the jurisdictions through which they pass. With respect to state and local jurisdictions, however, these pressures have been held in check by various legal barriers. The Ninth Circuit's decision has *removed* the critical legal constraint on tribal taxation of railroads—the requirement that a tax be predicated on a consensual relationship. If that decision is allowed to stand, the tribes can be expected to look increasingly to the railroads whose interstate lines happen to cross their reservations as a convenient captive revenue source.

II. THE HOLDING OF THE COURT BELOW THAT INDIAN TRIBES HAVE AUTHORITY TO TAX NON-MEMBERS IN THE ABSENCE OF A CONSENSUAL RELATIONSHIP IS CONTRARY TO DECISIONS OF THIS COURT

A. The Decision Below Misconstrues the Nature and Scope of Retained Sovereignty of Indian Tribes

The decision below is, at bottom, based upon a misconstruction of the scope of tribal sovereignty, as delineated by prior decisions of this Court. Reservation lands are delineated by treaty and Federal statute and are lands held in trust by the United States for the beneficial ownership of Indian tribes. Although physically within the United States and state and local geographical boundaries and subject to the ultimate sovereignty and con-

dians, 471 U.S. 195 (1985), unless a tribe itself voluntarily consents to such a limitation, by adopting a constitution pursuant to the provisions of the Indian Reorganization Act of 1934, 48 Stat. 984, (codified at 25 U.S.C. §§ 461 *et. seq.*), or otherwise, there is no statutory requirement that a Tribe *must* seek prior Executive Department approval before it may adopt tax laws affecting nonmembers. In any event, even where BIA approval is sought, as occurred in the instant case, such review is generally perfunctory (the Fort Peck Tribes' "Utilities Tax" was approved the next day) and without objective standards.

trol of the Federal Government, Indian tribes generally retain by treaty the right to exclude nonmembers from reservation lands. In addition to other specific rights that may be granted by treaty or Federal statute, Indian tribes are also held to retain "inherent sovereignty" by way of tribal self-government to "control their own internal relations, and to preserve their own unique customs and social order." *Duro*, 110 S.Ct. at 2060; *accord Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425 (1989).

A tribe's authority with respect to control of its external relations, however, is limited. "A tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations.'" *Brendale*, 492 U.S. at 425-26; *accord United States v. Wheeler*, 435 U.S. 313, 325 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). As this Court has stressed, "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the Tribe." *Wheeler*, 435 U.S. at 326; *accord Duro*, 110 S. Ct. at 2060.⁸

B. The General Principles Established by This Court in *Montana* Require A "Consensual Relationship" Between the Tribe and Nonmembers Before a Tribe Can Tax or Exercise Other Civil Authority Over a Nonmember

General principles for determining the scope of a tribe's inherent authority in civil affairs over nonmembers on reservation lands were formulated by this Court in *Montana*. In *Montana*, the Court held that the tribe's inher-

⁸ Where authority to regulate conduct is not within a tribe's inherent or congressionally-delegated jurisdiction, Federal or state and local law (to the extent not preempted) apply to the reservation. State and local tax laws may apply to nonmembers of the tribe, but may not be applied to on-reservation activities of tribal members.

ent sovereignty did not support a prohibition on non-member hunting and fishing on reservation lands to the extent it applied to fee lands owned by nonmembers (who were no longer subject to the tribe's power of exclusion). As held by this Court in *Montana*, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564.

The Court in *Montana* formulated a general test for determining inherent tribal authority over nonmembers. It found that as a "general proposition . . . the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The *Montana* Court recognized only two exceptions to this general principle. These exceptions require either (1) a *consensual relationship* between a tribe and a nonmember through, e.g., commercial dealing, contracts, leases, or other arrangements before a tribe may regulate through taxation, licensing or other means the activities of the nonmember or (2) a threat to, or direct effect on, the political or economic security of the tribe arising from the conduct of the nonmember before the tribe's inherent sovereignty may be invoked. As formulated by the *Montana* Court:

A tribe may regulate, through *taxation*, licensing, or other means, the activities of nonmembers who enter consensual relations with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. (emphasis added).

The general principles enunciated in *Montana* form a vital part of the jurisprudence of this Court and were recently relied upon as the basis for the opinion of Justice White (joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) in announcing the judgment of this Court (by plurality decision) in *Brendale*. In *Brendale*, the Court considered whether zoning authority over the "open" (generally range and fee land) and "closed" (predominantly forest) portions of the Yakima National reservation was vested in Yakima County or in tribal authorities. In his opinion announcing the judgment of the Court with respect to the "open" areas, Justice White applied the *Montana* presumption against tribal authority over nonmembers and found that neither of the two *Montana* exceptions was applicable. With respect to the "consensual relationship" test, Justice White found it undisputed that nonmember property owners challenging tribal zoning authority "do not have a 'consensual relationship' with the tribe simply by virtue of their status as landowners within reservation boundaries, as *Montana* itself necessarily decided." *Brendale*, 492 U.S. at 428. Justice White also found, based on the District Court's findings, that the County's exercise of zoning authority over the open areas would not imperil the protectible interests of the tribe. *Id.* at 432. Accordingly, in the absence of an express congressional delegation of power, tribal authority to zone the "open areas" of the reservation was held to be divested.

The *Brendale* Court reached a different result as to the "closed" areas—a result that turned on the tribe's power to exclude. Under Justice White's opinion, tribal zoning authority over both the "open" and "closed" areas would have been held divested based upon the *Montana* analysis (subject to the tribe's right to assert its protectible interests in Yakima County zoning proceedings). Justice Stevens (joined by Justice O'Connor) concurred in Justice White's opinion in *Brendale* only with respect to the "open" areas, finding that the tribe's right to ex-

clude survived in the closed areas and provided the tribe with the lesser included power to zone fee lands in the closed areas.⁹

The absence of a single majority view in *Brendale* leaves the law of Indian sovereignty in a somewhat uncertain state. But it is clear that, under any of the theories applied in *Brendale*, the Court below (which did not even cite *Brendale*) has overstepped the appropriate bounds. Neither of the *Montana* exceptions is present here, so that the general presumption against the assertion of sovereignty over nonmembers must be respected. And the Tribes have never had a power to exclude the railroads from their reservations, and therefore cannot predicate a power to tax on that authority.

C. This Court's Decisions Upholding Exercises of Tribal Taxation Authority Over Nonmembers Are Wholly Consistent With the "Consensual Relationship" Requirement Established by *Montana*

In its decision below, the Ninth Circuit rejected Burlington Northern's contention, directly predicated on *Montana*, that a "consensual relationship" must be demonstrated between Burlington Northern and the Tribes before tribal officials could be held to have authority to tax the railroad's property on its federally granted rights-of-way. Ignoring *Montana*, the Court below relied instead on general language in this Court's decisions in *Colville* and *Merrion* allegedly supporting its assertion that a "consensual relationship" with the Tribe was neither necessary nor relevant. Pet. App. at 11a. *Colville* and *Merrion*, however, both indisputably involved a "consensual relationship" as contemplated by *Montana*.

⁹ The remaining three Justices, in an opinion by Justice Blackmun, while disagreeing with *Montana*'s allegedly "reversed presumption," did not attempt "to excise [*Montana*] from [the Court's] jurisprudence." *Id.* at 456. Instead, Justice Blackmun argued that the second *Montana* exception supported a finding of inherent tribal authority to zone fee lands in the reservation. *Id.* at 456-57.

In *Colville*, which pre-dated *Montana*, the question of tribal taxation of nonmembers arose indirectly. Tribal authorities challenged (on federal preemption grounds) the authority of Washington State to apply its cigarette sales tax to on-reservation cigarette sales by tribal smoke-shops to nonmembers of the tribe. The tribes contended that tribal taxes imposed on smokeshop cigarette sales generated substantial revenues for the tribes and that, if the state were also found to have authority to tax these sales, the smokeshops would lose customers and the tribes would forfeit substantial revenues. *Colville*, 447 U.S. at 154-55.¹⁰

In response, the state challenged the authority of the tribes to tax on-reservation sales to non-members. The *Colville* Court (while upholding concurrent state taxation authority over on-reservation cigarette sales to non-members) rejected the state's argument that the tribes lacked authority to tax such sales. In the language quoted by the court below, the *Colville* Court found that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152.

Although the Court used broad language, *Colville* is at bottom wholly consistent with, and is essentially an example of, *Montana*'s "consensual relationship" requirement. Indeed, the existence of a "consensual relationship" in *Colville* is indisputable. Nonmembers of the tribe were granted consent by the tribe to enter onto reservation lands for the purpose and privilege of directly engaging in economic transactions with the tribe and tribal members (cigarette purchases). The tribe's tax was di-

¹⁰ In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), this Court held that states could not tax on-reservation cigarette sales to tribal members because the tribes enjoyed federal preemption from state taxation as it applied to on-reservation activities of members of the tribe.

rected solely at the conduct which was the subject of the consensual relationship (cigarette sales). Moreover, each of the cases cited by the *Colville* court in support of tribal taxing authority also demonstrates a clear "consensual relationship" between a tribe and nonmembers. See *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904) (nonmember lease of grazing rights); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (nonmember lease of tribal lands for grazing); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905), *appeal dismissed*, 203 U.S. 599 (1906) (tribal permission granted to nonmembers to engage in trade with tribal members on reservation lands). Indeed, if there could be any doubt on this issue, the *Montana* court itself specifically cited *Colville* as an example of a "consensual relationship" that could support tribal taxation authority over nonmembers. *Montana*, 450 U.S. at 565-66. *Colville* accordingly cannot be broadly read to obviate *Montana*'s "consensual relationship" requirement as the court below improperly attempted to do.

The court below also relied on *Merrion* for its assertion of tribal taxation authority over nonmembers notwithstanding the absence of a consensual relationship. Like *Colville*, *Merrion* does not establish this general proposition.

In *Merrion*, tribal authorities sought to impose a severance tax on oil and gas produced from reservation lands. Petitioners, who had entered into mineral leases with the tribe granting them permission to extract oil and gas in return for royalty payments, challenged the tribe's authority subsequently to impose severance taxes on their production. Essentially, petitioners argued that because the tribe could no longer exclude them from the reservation lands, the tribe could not tax their economic activities. The *Merrion* court, relying on language in *Colville*, rejected petitioners' assertion that tribal power to tax is based solely on the power to exclude. 455 U.S. at 137. The *Merrion* court further observed that the tribe's interest in levying taxes on nonmembers to raise

"revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services." *Merrion*, 455 U.S. at 138 (quoting *Colville*, 447 U.S. at 156-157).

Merrion, like *Colville*, involved a consensual relationship between the tribe and a nonmember regarding economic activities engaged in on the reservation by the nonmember with the tribe (i.e., a mineral rights lease). Thus, the holding in *Merrion* does not vitiate the consensual relationship requirement imposed by this Court in *Montana*.

Moreover, not only is a "consensual relationship" present in both *Colville* and *Merrion*, such a relationship is present in every case of which *amicus* is aware in which tribal taxation authority over nonmembers has been challenged and upheld in this Court. See, e.g., cases cited *supra* at p. 14. See also *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). The decision below thus stands on its own in holding, contrary to *Montana* and the factual circumstances present in every other tribal taxation case decided by this Court, that a consensual relationship is not required as a condition of tribal taxation authority over a nonmember. This basic question requires further examination by this Court.

III. THE RAILROADS' RIGHT OF PASSAGE OVER RESERVATION LANDS IS NEITHER DERIVED FROM NOR DEPENDENT UPON TRIBAL CONSENT

While holding that a "consensual relationship" was not necessary to the imposition of the tribal taxes, the Ninth Circuit nevertheless purported, in a footnote, to find such a relationship here. As stated by the Ninth Circuit, "[i]f a consensual relationship was necessary, the tribe consented to railroad rights-of-way by joining in Article VIII of the agreement ratified by the Act of 1888 and Burlington Northern chose to run rail lines through the reservations by voluntarily applying for

rights-of-way". Pet. App. at 11a n.7. These conclusions cannot withstand analysis.

Burlington Northern's rights-of-way through the Blackfeet and Fort Peck reservations were granted to the railroad's predecessor-in-interest directly by the Federal Government, not by tribal authorities. The rights-of-way are accordingly *federally-granted* rights, and not tribal rights of permission. The tribes were and are wholly without authority to withhold consent to federal rights-of-way grants through their reservations for railroad construction and other public purposes pursuant to applicable federal statutes. See *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 656 (1890). There is thus *no* consensual relationship between the tribes and the railroad in the instant case that could support the authority of the tribes to impose the taxes at issue as required by *Montana*.¹¹

¹¹ Nor were there any judicial findings in this case that could satisfy the second *Montana* exception, i.e., nonmember activity that would threaten or directly affect the vital interests of the Tribes. Neither the Ninth Circuit nor the District Court made specific factual findings regarding the second *Montana* exception. The Ninth Circuit's conclusory assertions that Burlington Northern's presence on tribal lands through use of its federally-granted rights-of-way could be subject to tax because Burlington Northern "receives the intangible benefits of a civilized society . . . and the tangible benefits of police and fire protection" (Pet. App. at 10a) does not even purport to address the otherwise stringent criteria of the "vital tribal interests" test as enunciated by this Court in *Montana* and *Brendale*. It is difficult to see how a railroad's long-standing use of its rights-of-way through reservation lands, without more, could be held to threaten vital tribal interests.

Indeed, the conclusory findings of the Court below would be broadly applicable to *any* incidental presence on, or use of, reservation lands by nonmembers, and would ignore this Court's observation in *Colville*, reasserted in *Merrion*, that a tribe's interest in levying taxes on nonmembers "is strongest when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services." There are no specific factual findings in this case on any of those issues.

Indeed, the overarching role of the Federal government with respect to railroad rights-of-way within the borders of Indian reservations makes tribal taxing power particularly inappropriate. Simply stated, it was the Federal government that initially selected the route for the rights-of-way, the Federal government that selected the recipients of the rights-of-way, and the Federal government that now determines whether service over those rights-of-way must be continued. In these circumstances, the Tribes have no sufficient attribute of sovereignty over federally granted rights-of-way from which a power to tax can flow.

For the most part, the railroads that operate lines through Indian reservations obtained their rights-of-way from the Federal government, as part of a national policy to encourage settlement of the American West. The statutes granting such rights-of-way did not give the railroads *carte blanche* to select the route their lines would transverse, so as to enable them to bypass the Indian reservations, nor was this typically made a matter for negotiation between the railroads and the tribes. Rather, the Federal government itself specified the route, the dimensions of the right-of-way, and other details of construction of the line.

The BN rights-of-way through the Blackfeet and Fort Peck reservations are a classic example of the way in which right-of-way grants typically occurred. In 1887 Congress granted to BN's predecessor a right-of-way through the Indian reservations in the northern Montana and northwestern Dakota Territories, which included the Fort Peck reservation. Act of February 25, 1887, ch. 130, 24 Stat. 402.¹² The Act set out the location and

¹² The Blackfeet and Fort Peck Indian reservations were established in the Act of May 1, 1888, ch. 213, 25 Stat. 113. That legislation ratified an agreement negotiated in 1886 and 1887 between the Tribes and the United States. Article VIII of the Agreement and implementing legislation granted to railroads (and others) rights-

dimensions of the right-of-way (*id.* §§ 2, 3) and provided that the railroad's rights would vest upon the approval by the Secretary of the Interior of maps showing the precise location of the road and related structures and the payment of the compensation set by the Secretary. *Id.* § 4. The construction and operation of the railroad were to be conducted "in accordance with such rules and regulations as the Secretary of the Interior may make" *Id.* The requisite plats were approved by the Secretary later that same year.

By 1890, BN's predecessor had completed construction of its railway through Montana to the boundary of the Blackfeet Reservation. Its application for a right-of-way through the Blackfeet Reservation was granted by President Harrison, and the Secretary of Interior determined that the dimensions of the right-of-way would be the same as those specified in the Fort Peck legislation. The survey maps were approved by the Secretary of Interior in 1893.

Thus the presence of BN's lines on the Fort Peck and Blackfeet reservations is a direct result of Federal specification, with no involvement by the Tribes. BN's rights-of-way "were taken out of the reservation by virtue of the grant" from the Federal Government (*Maricopa & Phoenix Railroad v. Arizona Territory*, 156 U.S. 347, 352 (1895)). As a result, the Tribes possess no sovereign power over those rights-of-way, and taxation by the Tribes should thus be precluded.

Equally important, having built their lines across reservations pursuant to Federal direction, railroads are now unable to abandon service over those lines—or even move a line to a route outside the reservation—without Federal authorization. Since 1920, the Interstate Commerce Act has prohibited a railroad from abandoning or

of-way through the reservations, subject to a Presidential "public interest" determination.

discontinuing service over any line (whether constructed before or after enactment of the statute) unless the Interstate Commerce Commission first determines that public convenience and necessity so permit. 49 U.S.C. § 10903; see *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 144-45 (1945). A similar public convenience and necessity finding is required as a prerequisite to the construction of a new line of railroad. 49 U.S.C. § 10901. Thus railroads are essentially "locked into" their operations across Indian reservations. Unlike most other businesses, who are free to pick up and remove themselves from the reservation if the economic burdens of tribal taxation outweigh the benefits of their continued presence, railroads are compelled by federal law to continue to operate across the reservations.

By the same token, the tribes are wholly precluded by federal law from excluding the railroads from their reservations, or forcing them to discontinue their operations. The power of the Interstate Commerce Commission over railroad abandonments and discontinuances is "exclusive and plenary." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320-21 (1981). The sole remedy of a tribe that wished to exclude a railroad from its reservation would be to file a petition with the Interstate Commerce Commission, asking that the Commission order the line abandoned. See *Thompson*, 328 U.S. at 145. And the Commission's determination would be based on the same "public convenience and necessity" standard prescribed by federal law for any other abandonment request.

In sum, the presence of the railroads on Indian reservations and the continued use of their rights-of-way are both governed by Federal law. Neither the railroads nor the tribes are free to terminate their relationship. Given the pervasive Federal involvement, tribal taxation of such rights-of-way is particularly inappropriate.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

ROBERT W. BLANCHETTE
KENNETH P. KOLSON *
ASSOCIATION OF AMERICAN
RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

*Counsel for Amicus Curiae
Association of American
Railroads*

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* Counsel of Record

APPENDIX

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RESERVATIONS CROSSED BY SELECTED RAILROADS

CARRIER	STATE RESERVATION	TAXED
Atchison, Topeka & Santa Fe	Arizona	
	Navajo	Proposed
	Hualapai	Yes
	Colorado River	No
	California	
	Colorado River	No
	New Mexico	
	Acoma	Yes
	Isleta	Yes
	Laguna	Yes
	Navajo	Proposed
	Sandia	Yes
	San Felipe	Yes
	Santa Anna	Yes
	Santo Domingo	Yes
Burlington Northern	Idaho	
	Nez-Perce	No
	Minnesota	
	Chippewas	No
	Montana	
	Ft. Peck	Yes
	Blackfeet	Yes
	Flathead	No
	Crow	Proposed
	Nebraska	
	Winnebago	No
	North Dakota	
	Ft. Totten	No
	Oklahoma	
	Cherokee	No
	Chickasaw	No
	Creek	No
	Iowa	No
	Kickapoo	No
	Kiowa	No
	Otoe	No
	Pawnee	No
	Peoria	No

2a

RESERVATIONS CROSSED
BY SELECTED RAILROADS—Continued

CARRIER	STATE RESERVATION	TAXED
Burlington Northern	Oklahoma	
	Quapaw	No
	Sac & Fox	No
	Seminole	No
	Shawnee	No
	Wyandotte	No
	South Dakota	
	Standing Rock	No
	Washington	
	Yakima	No
	Colville	No
	Puyallup	No
	Wyoming	
	Shoshone	No
Soo Line	Minnesota	
	Prairie Island	No
	White Earth	No
	North Dakota	
	Ft. Berthold	Yes
	Wisconsin	
Southern Pacific	Lac Courte Oueilles	No
	Arizona	
	Gila River	No
	California	
	Yuma River	No
	Nevada	
	Pyramid River	No
	Walker River	No
Union Pacific	Idaho	
	Fort Hall	Yes
	Coeur d'Alene	No
	Nevada	
	Pyramid Lake	Yes
	Oregon	
	Umatilla	No
	Washington	
	Yakima	No

3a

RESERVATIONS CROSSED
BY SELECTED RAILROADS—Continued

CARRIER	STATE RESERVATION	TAXED
Wisconsin Central	Wisconsin	
	Stockbridge	No
	Menominee	No
	Bad River	No

REPRESENTATIVE TRIBAL TAXES APPLICABLE TO RAILROADS

STATE RESERVATION	TAX	RATE	EXEMPTIONS
Arizona Hualapai	Ord. No. 26 Possessory Interest Tax (1989)	7% full cash value (\$ 4)	<ul style="list-style-type: none"> • Utility service lines, distribution and delivery facilities • Governmental entities • Retail businesses • Ranches and homesites (\$ 12)
Idaho Ft. Hall	Shoshone-Bannock Tribal Tax Code §§ 701-723 (1991)	3% assessed value (\$ 705)	<ul style="list-style-type: none"> • Utilities exclusively serving the reservation (\$ 714)
Montana Blackfeet	Ord. No. 80 Possessory Interest Tax (1987)	4% market value (\$ 4)	<ul style="list-style-type: none"> • Utilities exclusively serving the reservation • Governmental entities • Residential property • Commercial establishments (\$ 11)
Crow	Proposed Utility Tax	4% on utility property (\$ 1-5)	<ul style="list-style-type: none"> • Tribe and its instrumentalities • United States and its instrumentalities

Fort Peck	XVIII Ft. Peck Comp. Code chap. 3, Utilities Tax (1987)	3% of value (§ 303)	<ul style="list-style-type: none"> • Utilities whose property on trust land is valued at less than \$200,000 (§ 1-8) • Tribes and their instrumentalities • United states and its instrumentalities • Utilities whose on-reservation property is valued at less than \$200,000 (§ 306)
Nevada			
Pyramid Lake	Ord. No. XXI, Tax Code ch. 205, Easement Tax (1990)	2% of annual assessed value (§ 205.003)	<ul style="list-style-type: none"> • Tribal members • Persons exempt under Nevada law • Credit for taxes on same property paid to state (§§ 220, 221)
New Mexico			
Cochiti	Ord. No. 011-1987, Possessory Interest Tax (submitted 1/25/88)	6% of fair market value (§§ 3, 4)	<ul style="list-style-type: none"> • Utilities exclusively serving the tribe or its members • Residential leases (§ 10)
Isleta	Ord. 86-55 <i>Ad Valorem</i> Possessory Interest Tax (as amended 1987)	5% <i>ad valorem</i> (§ 3)	<ul style="list-style-type: none"> • Utilities exclusively serving the reservation • Commercial business leases and permits (§ 10)

REPRESENTATIVE TRIBAL TAXES APPLICABLE TO RAILROADS—Continued

STATE	RESERVATION	TAX	RATE	EXEMPTIONS
New Mexico	Laguna	Ord. No. 400-86 Possessory Interest Tax (1986)	5 % of fair market value (§§ 3, 4)	<ul style="list-style-type: none"> • Utilities exclusively serving the reservation • Commercial business leases (§ 10)
		Res. No. 13-90 Tax Ordinance (1990)	5 % <i>ad valorem</i> (§§ 2.01, 2.05)	<ul style="list-style-type: none"> • Utilities exclusively serving the reservation (§ 2.07)
	Santa Clara	Res. No. SD-4-89-02 II Laws of the Pueblo of Santo Domingo (1987)	4 % taxable value (§ 404)	<ul style="list-style-type: none"> • Interests held by United States, New Mexico • First \$50,000 of taxable value • Interest held or used exclusively for agricultural purposes • \$25,000 x number of tribal members employed on Pueblo land (§ 407)
	Santo Domingo			
Taos	II Laws of Pueblo of Taos (1989)		4 % assessed value (§§ 302, 304)	<ul style="list-style-type: none"> • Interests held by tribal or other governmental entities and not used for business purpose • First \$50,000 of assessed value • Interests held for agricultural purposes

- Tribal members' land assignments not used for business purpose
- Deduction of \$20,000 x number of Pueblo members employed on tribal lands (§§ 307, 308)
- Utilities exclusively serving the Pueblo or its members (§ 2.07)

[Information not available]

Zia	Pueblo of Zia Tax Ord. (submitted 3/28/88)	5% assessed value (§ 2.05)
North Dakota Ft. Berthold	Tribal Tax Code §§ 701-722 (1990)	3.5% assessed value (§ 705)

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On Petition for a Writ of Certiorari to the
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MOTION FOR LEAVE TO FILE BRIEF FOR
RESERVATION TELEPHONE COOPERATIVE
AND BRIEF FOR RESERVATION TELEPHONE
COOPERATIVE AS AMICUS CURIAE IN SUPPORT
OF THE PETITION FOR A WRIT OF CERTIORARI

ROGER A. TELLINGHUISEN
FULLER & TELLINGHUISEN
203 West Main Street
Lead, SD 57754

MICHAEL GEIERMANN
CHAPMAN & CHAPMAN
410 East Thayer Avenue
Bismarck, ND 58502-1258

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
Winner, SD 57580
(605) 842-2500

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AMICUS CURIAE IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI**

Reservation Telephone Cooperative respectfully moves
this Court, pursuant to Rule 37.2 of the Rules of the
United States Supreme Court, for leave to file the at-
tached *amicus curiae* brief in support of the petition for

a writ of certiorari. *Amicus* Reservation Telephone Cooperative sought and obtained the consent of petitioner Burlington Northern Railroad Company. However, on October 25, 1991, when counsel for respondent Fort Peck and counsel for respondent Blackfeet Tribe were requested to give their consent, they conditioned their consent on receipt of the attached brief one week prior to the filing date. Because the time for filing was less than one week away, it was impossible to comply with such a condition.

Amicus Reservation Telephone Cooperative is vitally interested in this case because it operates a telephone cooperative within the original boundaries of the Fort Berthold Indian Reservation and is potentially subject to the imposition of Fort Berthold Tribal taxes scheduled to take effect January 1, 1992. Unlike petitioner, which is self described as a captive non-resident, non-member, *amicus* Reservation Telephone Cooperative is a long-standing, permanent resident, non-member entity facing taxation of its trust and fee land interests now within the limits of the reservation, as the Blackfeet ordinance would tax fee interests. *Amicus* Reservation Telephone Cooperative is required to provide reservation service to everyone who requests telephone service. The issue involved in this case—the nature and extent of Indian Tribal taxing power over non-members of the tribe—has far-reaching ramifications for all non-members who engage in on-reservation activities and/or live within reservation boundaries. Fortified with the assistance and encouragement of the United States, tribal governments across the nation have proposed or enacted ordinances to tax non-member interests within the limits of Indian reservations. Such tribal taxing ordinances are based on a misplaced understanding of earlier opinions of this Court addressing limited and special transactions occurring on tribal trust land. These tribal ordinances seek to tax vital interests on rights-of-way and other fee land interests of non-members.

The taxation involved here is taxation without consent, taxation without representation, taxation without limitation, and taxation without recourse to state or federal court. The ramifications of such taxation significantly impact entities such as *amicus* Reservation Telephone Cooperative, as well as other businesses and individuals within the limits of Indian reservations.

A critical examination of the ramifications of tribal taxing authority over non-members is crucial to a well-reasoned decision on the petition for a writ of certiorari. As *amicus curiae*, Reservation Telephone Cooperative seeks to bring before this Court fundamental considerations involving the nature and extent of tribal taxing power, specifically over fee interests involving both non-resident and resident non-members. *See* attached brief. These considerations, while directly applicable to the instant case, transcend the specific circumstances of the petitioner and thus are not necessarily all addressed by petitioner. For the foregoing reasons, Reservation Telephone Cooperative respectfully requests that its motion for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari be granted.

Dated this 1st day of November, 1991

ROGER A. TELLINGHUISEN
FULLER & TELLINGHUISEN
203 West Main Street
Lead, SD 57754

MICHAEL GEIERMANN
CHAPMAN & CHAPMAN
410 East Thayer Avenue
Bismarck, ND 58502-1258

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
Winner, SD 57580
(605) 842-2500

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AS AMICUS CURIAE IN SUPPORT OF THE
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INTEREST OF AMICUS CURIAE

The concern that prompts the filing of this Brief can be simply stated. Tribal governments across the country, with the assistance and encouragement of the United States, have proposed or enacted ordinances to tax non-member interests within the limits of Indian reservations similar to the ordinances now before this Court. Almost without exception, these tribal ordinances are premised upon an unwarranted and sweeping extension of several opinions of this Court addressing limited and special transactions on tribal trust land, so as to generally tax other interests on rights-of-way and other *fee land* interests of non-members, as the Blackfeet ordinance would tax fee interests. Advancing the tribal territorial sovereignty argument of its constituent agencies, the United States has specifically endorsed this position regarding the taxation of these and other fee land interests and told the court of appeals: “[E]ven without a direct property interest in the land . . . services, costs, and advantages provide an *independently sufficient nexus* for the tribal tax. . .” Brief for the United States at 11, *Burlington Northern Railroad v. Fort Peck Tribal Executive Bd.*, 924 F.2d 899 (9th Cir. 1991) (emphasis added).

Armed with this support from the United States, which is not likely to be modified in the foreseeable future, at least in the absence of a controlling opinion from this Court, it is fair to assume that even those tribes that have not yet adopted a similar position, will quickly follow suit. As the tribal attorney explained:

If the Tribal Business Council, chooses to incorporate agriculture into the tax code, the Council will be well within their legal authority to do so. If the Tribal Business Council chooses to exempt fee lands for the first (1st) year tax year, the Council may create this exemption or it may not . . . The Tribal Business Council recognizes that chief among its

powers of sovereignty is the power of taxation, which may be exercised over members of the Tribe and over non-members. . . .

Memorandum from Patricia Diane Johnson, Staff Attorney, Three Affiliated Tribes of the Fort Berthold Reservation (May 31, 1991), App. B at 16a.

Only a serious misreading of the decisions of this Court could lead to the conclusion that a tribal government can tax property that it undeniably cannot zone. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Yet this is the predominant view within the limits of Indian reservations today.

As a result, what is essentially at issue here is taxation without consent, taxation without representation, taxation without limitation, and taxation without recourse to state or federal court. The very nature of this seemingly unbridled discretion promises devastating consequences for businesses and others similarly situated within the limits of Indian reservations, such as *amicus* Reservation Telephone Cooperative.

Amicus Reservation Telephone Cooperative is a small, successful, telephone cooperative in rural North Dakota. A brief history of this area is set forth in *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), and need not be repeated here. For our purposes, it is sufficient to note that the amount of fee land and non-member settlement in the original Fort Berthold Reservation is long standing and substantial. There are a number of small towns, including the City of Parshall, North Dakota, where the Corporate office for *amicus* Reservation Telephone Cooperative is located. For half a century, until 1971, this area "as a matter of general practice" was not "treated as belonging on the reservation" *City of New Town*, 454 F.2d at 123. Despite this fact, *City of New Town* resolved that issue in favor of the reestablishment of the original reservation boun-

daries.¹ As a result, some of the previous homestead and other policies of the United States described in *Montana v. United States*, 450 U.S. 544 (1981), regarding settlement of Indian reservation, policies which created justifiable expectations, have been turned on their head.

In any event, although the exact date of the beginning of telephone service is not known, by 1951 several individual companies and area residents decided to form a rural telephone cooperative. Articles of Incorporation were filed in North Dakota on October 16, 1951, a number of additional existing companies were later purchased, and service has been expanded and continued to be improved throughout the reservation and beyond since that time. Today, *amicus* Reservation Telephone Cooperative operates over a thousand miles of lines with rights-of-way, as one would expect, crossing both trust and fee property. Congress authorized the Secretary of the Interior nearly a century ago to grant these rights of way in the nature of an easement. See discussion *infra*. The Cooperative serves 4,210 subscribers, including both members and non-members of the Three Affiliated Tribes. Previously designated as "beneficial rights-of-way" and processed without access fees or damages, the rights-of-way across tribal trust land were, as recently as 1985, deemed to provide a "much needed service" for the "benefit of members of the Three Affiliated Tribes", according to a tribal resolution. App. E at 23a.

In this respect, this history of *amicus* Reservation Telephone Cooperative is not unlike that of other cooperatives and businesses located throughout the area. Several rural electrical cooperatives track the same development and today serve the resident population with

¹ See also *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). To the extent that *City of New Town* predated *DeCoteau* and *Rosebud*, see *Puyallup Tribe, Inc. v. Dep't. of Game of Washington*, 433 U.S. 165, 173 n.11 (1977).

lines and rights-of-way that cross trust and fee lands. Other companies, such as pipeline companies, are of a more recent origin but have also made extensive commitments. Even some independent oil companies that operate solely on fee land are now threatened by tribal severance taxes. Others with operations on both fee and trust lands are faced with similar problems. In addition, the one railroad which the area is fortunate enough to have still in service (the Soo Line) is now in jeopardy, even though its rights-of-way are almost entirely on fee land.²

Earlier this year, *amicus* Reservation Telephone Cooperative and other affected businesses situated in this area of North Dakota were publicly notified that the Three Affiliated Tribes had adopted a Possessory Interest Tax. Shortly thereafter, copies of the tribal tax code and other information were distributed for comments at a public hearing. After this hearing, and despite objections, the tribal business committee decided:

To tax those oil, gas, utility and railroad activities located on the *entire* reservation, including any facilities and lines of those entities to be taxed which are located upon *fee lands*, which is their [i.e. the tribal business committee's] *right*.

Letter from Tom Needham, Asst. Exec. Dir., Three Affiliated Tribes Tax Commission (June 24, 1991), App. C at 19a (emphasis added).

² Petitioner noted some of the tribal taxes that have recently surfaced across the country. Other representative examples of similar tribal taxes proposed or enacted include a tax on agriculture and other fee lands (Idaho); a possessory interest tax on rights-of-way (Washington); a discriminatory after-the-fact surcharge limited to non-member lessees (South Dakota and North Dakota); a Business Licensing Tax (with a penalty that authorizes an order "directing the police to remove the non-member physically from the Reservation") applicable to a non-member populated and settled area comparable to *Brendale* which requires consent to the jurisdiction of the tribal court (North Dakota and South Dakota); a doubling of lease fees limited to non-member lessees (South Dakota); and numerous other non-member business taxes.

Although the tax formula is less than exact, one thing is clear: the tax is substantial. The value of the land was "set" at twenty eight hundred dollars (\$2800.00) per acre (many times the fair market value), the result of a factor stated to be "fifty percent" of the cost for a company to "go around" the reservation. Letter from Tom Needham, Asst. Exec. Dir., Three Affiliated Tribes Tax Commission, (June 24, 1991), App. C at 20a. As recently as October 17, 1991, *amicus* Reservation Telephone Cooperative was notified that the formula had been modified again, additional exemptions were said to be adopted and the effective date of the tax was postponed until January 1, 1992—but even this uncertainty, although not atypical, is only a small part of the problem. App. A at 1a.

Subsequent to the decision below, the Ninth Circuit Court of Appeals further complicated the entire process by now requiring opponents of this or similar tribal ordinances to exhaust all remedies in tribal court prior to filing for relief in federal court. *Burlington Northern Railroad v. Crow Tribal Council, et al.*, 940 F.2d 1239 (9th Cir. 1991).³ As a result, the addition of onerous escrow requirements, coupled with a virtually unlimited tribal appeal process that sometimes goes on for years, squarely places the tribal tax issue before this Court in a position of such importance as to be worthy of immediate consideration.

The Indian Civil Rights Act has not transformed Indian reservations into the bastions of fundamental fairness that the United States would have this Court envision. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 82 (1978) (White, J., dissenting) (1978). In point of fact, for at least four decades, the concern in Congress over the lack of fundamental fairness in Indian country, has focused on the actions of tribal governments, not

³ This holding is in direct conflict with the decision below, which the Ninth Circuit did not even cite. Pet. App. at 1a.

State governments. See *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *Santa Clara Pueblo*, 436 U.S. 49. Most recently, this concern surfaced in the context of a 1988 Report from the United States Department of Justice, Office of Legislative and Intergovernmental Affairs. App. G. This ten page federal report describes the situation on reservations as "crucial" and concludes that unless remedied,

individual rights guaranteed by Congress will remain a largely unfulfilled promise; one which continues to protect individual rights in *theory* but not in *practice*.

App. G at 29a (emphasis added). The remedy, S. 517, was introduced on March 6, 1989, by Senator Orrin Hatch, to expressly provide for federal court review. 135 Cong. Rec. 23 (1989). *Amicus* Reservation Telephone Cooperative can add nothing to emphasize the concern reflected in the pages of the Congressional Record dealing with the introduction of this legislation. See App. H. Opposition by Tribal governments has continued to block legislative efforts on this issue to date.

Moreover the last word from Congress specifically addressed to the construction, operation, and maintenance of telephone lines for general telephone business through any Indian reservation is relevant. *Amicus* Reservation Telephone Cooperative, like the petitioner, obtained its rights-of-way from the federal government. Significantly, the relevant statute, enacted nearly a century ago, seems to preclude tribal taxes. It provides, in part:

The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation. . . .

The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding \$5 for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this section; *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be construed as to deny the right of municipal taxation in such towns and cities.

Act of March 3, 1901, ch. 832, 31 Stat. 1058, 1083 (1901) (codified at 25 U.S.C. § 319 (1988)). App. F. *See* 25 C.F.R. § 169.26 (1991). At the very least, this language forecloses any argument that Congress intended in some essential (yet unspoken) manner to sanction an additional tribal tax burden.

Amicus Reservation Telephone Cooperative does not doubt tribal governments can find a use for any amount of revenue raised by taxes of this nature—but that, too, is beside the point. Proponents of tribal territorial sovereignty have frequently reminded this Court of the ex-

tensive fiduciary duties and other obligations owed Indian tribes by the United States. In this instance, however, the proposed tax would result in placing this national obligation on a captive few. *Amicus* Reservation Telephone Cooperative would submit that everyone in the United States would be better served if the government simply lived up to that national commitment, whatever it is, at the expense of all taxpayers. Stretching the decisions of this Court to cover situations clearly not intended, so that an unfortunate few will be forced to unjustifiably bear whatever burden the United States owes Indian tribes and whatever else Indian tribes deem appropriate is not a viable solution.

This is especially so in light of our final point. *Amicus* Reservation Telephone Cooperative would submit that it would be difficult to intentionally devise a scheme more destructive of present and future reservation economic development, more certain to insure that poverty already prevalent will only get worse, and more acrimonious and divisive for members and non-members alike, than that presented here. Correspondence from the Tax Commission of the Three Affiliated Tribes makes clear the reality of the situation. After granting an extension requested for the submission of certain information in connection with the proposed tax, the Executive Director of the Tax Commission stated:

In addition, *due to the cancellation of projects planned for the reservation by the companies which may become subject to the Possessory Interest Tax*, no other extension will be deemed warranted. . .

Letter from Joseph J. Walker, Exec. Dir., Three Affiliated Tribes Tax Commission (Aug. 8, 1991), App. D. at 22 (emphasis added).⁴

⁴ The Counties and Cities in these reservation areas are statistically among the poorest in the Nation. In some instances, the negative implications of tribal taxation will unquestionably cripple, if

All of which makes the remark of Justice Holmes more appropriate than ever: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

SUMMARY OF ARGUMENT

Tribal governments across the country, with the assistance and encouragement of the United States, have proposed or enacted ordinances to tax non-member interests on rights-of-way on trust and fee lands within the limits of Indian reservations similar to the ordinances now before this Court. These tribal ordinances are premised upon an unwarranted and sweeping extension of several opinions of this Court addressing limited and special transactions on tribal trust land. The very nature of this seemingly unbridled discretion promises devastating consequences for businesses and others similarly situated within the limits of Indian reservations, such as *amicus* Reservation Telephone Cooperative.

not destroy, this already limited tax base (a tax base undermined each month by the almost wholesale conversion of fee land to trust land and by other exemptions and entanglements). See merits briefs in support of petitioners-cross respondents in *Confederated Tribes of the Yakima Nation v. County of Yakima*, Nos. 90-408, 90-577.

ARGUMENT

“Generalizations on this subject have become particularly treacherous”.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

This statement from *Mescalero* is most appropriately remembered here. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court was presented with a reservation situation *atypical* in three important respects. First, title to the entire reservation was actually held in trust by the United States for the Jicarilla Apache Tribe. *Merrion*, 455 U.S. at 133. Second, the activity taxed was “the extraction of *vital* and *depletable* resources from trust lands” “intimately associated with the Indian land situs and significant tribal interest”. Brief for the Secretary of the Interior at 5, *Merrion*, 455 U.S. 130 (emphasis added). Finally, at least some type of formal business relationship was unquestionably evidenced by mineral leases approved by the United States. Thus, even according to the United States, there was “no occasion” in *Merrion* for the Court to “consider” tribal taxation in any context other than this “because the leases involved are for the extraction of oil and gas on *tribal lands*.” Brief for the Secretary of the Interior at 9, n.1, *Merrion*, 455 U.S. 130 (emphasis added). For the most part, the opinion of the Court in *Merrion* reflects this understanding, but the opinion of the court of appeals here does not. This is the crux of the problem. In context, consent is important and the facts are important. Generalizations and absolutes are of little help in resolving questions of this nature. Easements and rights-of-way on trust or fee land or mere ownership of fee lands within the limits of Indian reservations all present radically different fact situations, far removed from the holding of *Merrion*.

In *Brendale*, the plurality opinion said the same thing in another way. In reviewing the second exception in

Montana, Justice White noted that it was “significant” that the so called second *Montana* exception was prefaced by the word “may” which meant it “depends on the circumstances”. *Brendale*, 492 U.S. at 428-29 (emphasis as in original). *Amicus* Reservation Telephone Cooperative would note that the first *Montana* exception expressly dealing with taxation is also prefaced by the word “may” and that here too, it should also mean that it “depends on the circumstances” for the same reason as in *Brendale*. The extent of these differing circumstances within limits of an Indian reservation can best be pictured by reference to a single statement of this Court in *Duro v. Reina*:

Indeed, the population of non-Indians on reservations generally is greater than the population of all Indians, both members and nonmembers.

Duro v. Reina, 110 S. Ct. 2053, 2065 (1990).

With that said, we start at the beginning with this Court’s decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Even the date of that beginning is telling. Other than *Morris v. Hitchcock*, 194 U.S. 384 (1904), which is clearly distinguishable, it is somewhat surprising, to say the least, that the question of tribal taxation of non-members was not even an issue squarely addressed by this Court until 1982. It is for this reason, and not because of the actual holding of the majority in *Merrion*, that consideration should at least begin with a review of the history set forth in the dissenting opinion of Justice Stevens, the most extensively documented discussion of this question to date. *Merrion*, 455 U.S. at 160 (Stevens, J., dissenting).

Assuming that review, we stress here one major point that has since proven true. Irrespective of whether everyone would agree, as we do, with the dissent’s suggestion that the majority in *Merrion* did not give adequate “attention to the critical difference between a tribe’s powers over its own members and its power over

nonmembers," the Court has twice revisited the issue in much more detail and placed primary emphasis on that distinction. *Id.* See *Brendale*, 492 U.S. 408 (1989); *Duro*, 110 S. Ct. 2053 (1990). The opinion of Justice Blackmun in *Brendale* retraces and underscores, step by step, the consequence of that process to that date. *Brendale*, 492 U.S. at 488 (Blackmun, J., concurring and dissenting).

This evolution of the case law merits further consideration before extending *Merrion* beyond the fact situation presented therein. The additional non-member property interests at issue here are worthy of this consideration, for, as the Court noted in *Duro*:

With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, and n.7, (1978) (noting that Bill of Rights is inapplicable to tribes, and holding that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, does not give rise to a federal cause of action against the tribe for violations of its provisions). This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173, (1982) (STEVENS, J., dissenting).

Duro, 110 S. Ct. at 2064.

To suggest that such considerations are not appropriate here because of the holding of *Merrion* is pure sophistry. And the best evidence of this point is the manner in which the United States originally structured this argument before the Court in *Merrion*.

In its initial Memorandum to the Court in *Merrion*, the United States argued that the intervening decision in *Washington v. Confederated Tribes of the Colville Indian*

Reservation, 447 U.S. 134 (1980), was dispositive of the issue in *Merrion*. Memorandum for the Secretary of Interior in Opposition at 2, *Merrion*, 455 U.S. 130. As a result, according to the United States *Merrion* presented “no seriously arguable question of general importance not already authoritatively settled”. Memorandum for the Secretary of the Interior in Opposition at 2, *Merrion*, 455 U.S. 130. But on the merits, while accurately reciting the holding in *Colville* as “the power to tax transactions occurring on trust lands and significantly involving the tribe or its members”, the United States hedged its position by way of an artful note that the United States really hoped *Merrion* would reflect. Brief for the Secretary of the Interior at 9, *Merrion*, 455 U.S. 130:

This is not to say, of course, that tribes do not have authority, as one of the “attributes of sovereignty over both their members and their territory [citations omitted] to tax transactions occurring on *fee* land within the reservation, including that belonging to non-Indians. [citations omitted].

Brief for the Secretary of the Interior at 9, n.1, *Merrion*, 455 U.S. 130 (emphasis added). Even the majority in *Merrion* did not, however, go this far. In any event the argument proves too much. This Court meant what it said in *Colville* and said what it meant.

“[T]rust lands” means *trust* lands and not *fee* lands. Moreover, activity “significantly involving” tribal interests may mean something like the depletion of a vital tribal resource, but should not mean mere right-of-way presence, when that presence is authorized by the federal government.

Colville is significant in one final respect that merits limited discussion. Reduced to its facts, *Colville* only reflects an unsuccessful attempt to market a tax exemption to non-members willing in isolated instances to take advantage of that special situation. It is less than clear how this fact situation, even in view of *Merrion*, can be

fairly said to constitute sovereignty jurisprudence sufficient to have established in this Court a fundamental principle that Indian tribes can tax in fact situations beyond those presented in either case. Yet, as noted *supra*, this is the common perception among advocates of tribal taxation. Perhaps the predisposition of the Ninth Circuit to readily accept almost any tribal position is part of the problem.

While it is undoubtedly significant that any decision of the Ninth Circuit has an especially broad impact in federal Indian law, as petitioner has noted, two additional considerations also bear mention in this respect. For a number of years, the Court of Appeals for the Ninth Circuit has seemed almost prone to categorically accept tribal claims related to full territorial sovereignty within the limits of Indian reservations. Several decisions of this Court support this point:

In 1977, a congressional Policy Review Commission, citing the lower court decisions in *Oliphant* and *Belgarde*, concluded that "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians." 1 Final Report of the American Indian Policy Review Commission 114, 117, 152-154 (1977). However, the Commission's report does not deny that for almost 200 years before the lower courts decided *Oliphant* and *Belgarde*, the three branches of the Federal Government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians. As the Vice Chairman of the Commission, Congressman Lloyd Meeds, noted in dissent, "such jurisdiction has generally not been asserted and . . . the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction." Final Report, *supra* at 587.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 205 (1978).

The Court of Appeals held that, with respect to fee-patented lands, the Tribe may regulate, but may not prohibit, hunting and fishing by non-member resident owners or by those, such as tenants or employees, whose occupancy is authorized by the owners. *Id.*, at 1169. The court further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. *Ibid.* The Court of Appeals found two sources for this tribal regulatory power; the Crow treaties, "augmented" by 18 U.S.C. § 1165, and "inherent" Indian sovereignty. We believe that neither source supports the court's conclusion. . . . The Court of Appeals also held that the federal trespass statute, 18 U.S.C. § 1165, somehow "augmented" the Tribe's regulatory powers over non-Indian land. 604 F.2d, at 1167. If anything, however, that statute suggests the absence of such authority, since Congress deliberately excluded fee-patented lands from the statute's scope. . . . Beyond relying on the Crow treaties and 18 U.S.C. § 1165 as source for the Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the reservation, the Court of Appeals also identified that power as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation. 604 F.2d at 1170. But "inherent sovereignty" is not so broad as to support the application of Resolution No. 74-05 to non-Indian lands. . . .

Montana v. United States, 450 U.S. 544, 557, 561, 563 (1981).

Initially, we reject as overbroad the Ninth Circuit's categorical acceptance of tribal zoning authority over lands within reservation boundaries . . . The Ninth Circuit, however, transformed this indication that there may be other cases in which a tribe has an interest in activities of nonmembers on fee land into a rule describing every case in which a tribe has such an interest. Indeed, the Ninth Circuit equated an Indian tribe's retained sovereignty with

a local government's police power, which is contrary to *Montana* itself.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 428-29 (1989).

The Court of Appeals concluded that the distinction drawn between 'members' and 'nonmembers' of a tribe throughout our *Wheeler* opinion was "indiscriminate," and that the court should give "little weight to these casual references." 851 F.2d, at 1140-1141. The court also found the historical record "equivocal" on the question of tribal jurisdiction over nonmembers.

Duro v. Reina, 110 S. Ct. 2053, 2058 (1990).

In addition, we would be remiss if we neglected to mention the supporting role the United States has played in this process in the Ninth Circuit and in this Court. *Oliphant*, *Montana*, *Brendale*, and *Duro* reflect historical arguments and documentation that this Court found authoritative and persuasive. Importantly, the United States, advocating tribal territorial sovereignty on behalf of its constituent agencies, formally resisted and rejected each argument of substance in each case (except *Brendale*) until this Court announced its Opinion. Even then, the United States acknowledged only the most narrow application, while renewing all remaining arguments in related litigation then pending, as it has here. This past position of the United States should be borne in mind if the Solicitor General should be invited to express the views of the United States in this case as in other cases of this kind.

It is not too late in the day for this case, and non-member interests can ill-afford to wait and see if a decision of another court of appeals will eventually conflict with the decision below, no matter what the United States might say. This is a special and important question of federal Indian law, which has not been, but should

be, clarified and settled by this Court. In the past this Court has been particularly sensitive when similar questions have been presented. For this reason, that sensitivity is sorely needed in the consideration of this particular petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROGER A. TELLINGHUISEN
FULLER & TELLINGHUISEN
203 West Main Street
Lead, SD 57754

MICHAEL GEIERMANN
CHAPMAN & CHAPMAN
410 East Thayer Avenue
Bismarck, ND 58502-1258

November 1, 1991

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
Winner, SD 57580
(605) 842-2500

APPENDICES



1a

APPENDIX A

THREE AFFILIATED TRIBES
OF THE
FORT BERTHOLD RESERVATION

[EMBLEM]

TRIBAL TAX CODE

DECEMBER 1990

RESOLUTION OF THE GOVERNING BODY OF
THE THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION

WHEREAS, This Nation having accepted the Indian Reorganization Act of June 18, 1934, and the authority under said Act; and

WHEREAS, The Constitution of the Three Affiliated Tribes generally authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, The Tribal Business Council adopted the Tribal Tax Code in December of 1990 and staffing was completed in April of 1991; and

WHEREAS, It has been recommended by the Tribal Tax Commission that, Chapter Seven of the Tribal Tax Code be amended to include the following:

SECTION 714. Exemptions.

1. Service Lines. No possessory interest used exclusively to operate a utility service line, utility delivery facility, or utility distribution facility which exclusively serves the Reservation shall be subject to this tax. Possessory interests used to operate utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall not be subject to this exemption.

2. New Wells. All New Wells will be exempt from the Possessory Interest Tax for the first fifteen (15) months of production after January 1, 1991. Those wells in production prior to January 1, 1991, shall not be subject to this exemption.

WHEREAS, In order to maintain the correct numbering sequence, all subsequent sections will be numbered appropriately.

WHEREAS, It has also been recommended by the Tribal Tax Commission that Chapter Seven of the Tribal Tax Code be amended to reflect the following:

SECTION 704. The Tax Cycle.

The initial tax cycle of this Chapter commences on the (1st) of January, 1992, and terminates on December 31, 1994. Thereafter the tax cycle shall take a full three-year period ending the last day in December of the third year of the tax cycle.

SECTION 705. Imposition and Rate of Tax.

The tax rate under this section, and all subsequent sections, will be changed from the preliminary rate of three point five percent (3.5%) to one percent (1%).

SECTION 706. Computation of Value of Possessory Interest.

The valuation for assessment under this section, and all subsequent sections, will be changed from the preliminary assessment of one-hundred percent (100%) to forty-five percent (45%).

SECTION 706. (5) (a) (ii)

The land valuation as described under this section will be changed from \$2,800 per acre to the following:

For lands for which there is a contract approved by the United States Department of the Interior, the Bureau of Indian Affairs, the rental fees incorporated in the said contracts shall be the basis of land values for assessment.

NOW, THEREFORE, BE IT RESOLVED, That the Tribal Business Council of the Three Affiliated Tribes hereby adopts and approves the above stated amendments to Chapter Seven of the Tribal Tax Code.

CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Bert-hold Reservation, hereby certify that the Tribal Business Council is composed of 7 members of whom 5 constitute a quorum, 7 were present at a Special Meeting thereof duly called, noticed, convened, and held on the 11th day of October, 1991; that the foregoing Resolution was duly adopted at such Meeting by the affirmative vote of 4 members, 1 member opposed, 2 members abstained, 0 members not voting, and that said Resolution has not been rescinded or amended in any way.

Dated the 11th day of October, 1991.

/s/ [Illegible]

Tribal Business Council
Secretary

ATTEST:

/s/ [Illegible]

Chairman, Tribal Business Council

CHAPTER 7: THE POSSESSORY INTEREST TAX OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION

SECTION 701. Statement of Purpose. Pursuant to the provisions of Chapter 1 of this Code, it is the policy of the Three Affiliated Tribes of the Fort Berthold Reservation to provide their members and non-members residing, doing business, or working within the jurisdiction of the Tribe with essential governmental services. To finance this governmental policy, the Tribe adopts in this Chapter a possessory interest tax, which will provide the Tribe with a portion of the revenues necessary to fund essential governmental services within their jurisdiction boundaries and which will benefit all individuals and businesses on the Reservation.

SECTION 702. Short Title. The tax levied by this Chapter shall be called the "Possessory Interest Tax" of real and personal property, which includes any right or interest, and actual ownership obtained in a tract of land, (trust, restricted or fee land), within the boundaries of the Fort Berthold Reservation by lease, permit, contract, easement, right-of-way, deed, or other agreement), which authorizes a person, (as defined hereunder in Section 102.12 of this Code), to use that real and personal property for business, (as defined hereunder in Section 706.1.a.), profit, or use, except as otherwise exempted Section 108 of this Code.

SECTION 703. Definitions.

1. All terminologies and concepts as defined in Section 102, Subsections 1, through 26, of the Code shall apply hereunder.

2. Regulations. "Regulations" shall mean any written rules and regulations adopted and administered by the Tax Commission pursuant to this Code.

3. Taxes. "Taxes" shall mean the tax, and any interest, penalty, or costs, assessed or imposed pursuant to this Code.

4. Commercial Business. "Commercial Business" shall mean any business for profit which is not a utility/railroad, and shall include agriculture, (which includes farming, ranching, grazing, livestock, animal husbandry, and horticulture), and similar land related activities and mining of surface and subsurface rights.

5. Utility. "Utility" shall mean any privately or publicly held entity primarily engaged in supplying, transmitting, transporting or distributing electricity, oil and oil products, gas, natural gas, natural gas products, water, carbon dioxide, liquid hydrocarbons, telephone, telegraph or other communication services, or transportation services including freight services.

SECTION 704. The Tax Cycle. The tax rate and the approaches to determining the appraised value, (i.e., the Tax Base) of the Possessory Interest shall remain constant for a three-year tax cycle. The initial tax cycle of this Chapter commences with the effective date of this Chapter and terminates on December 31, 1992. Thereafter, the tax cycle shall take a full three-year period ending the last day in December of the third year of the tax cycle.

SECTION 705. Imposition and Rate of Tax. The Possessory Interest tax set forth herein shall be imposed on the ownership of possessory interest on January 1st of each year and shall be assessed at the rate of three and one-half percent (3.5%) of the assessed value of the possessory interest as determined and appraised in accordance with approaches/methodologies as utilized in Section 706.5. The established said rate and methodologies shall be and remain the same as herein unless modified, pursuant to Section 103 of this Code, by the Tribal Business Council and implemented by the Tax Com-

mission. The said tax rate may not be escalated by more than the annual rate of inflation as measured by the annual average rate of the GNP Price Deflator of the preceding year for the succeeding tax cycles. Upon passage of any determination and resolution changing the tax rate and/or the methodologies, notice shall be given to all taxpayers and shall be published in newspapers of general circulation and posted or published at such places as the Tax Commission designates.

SECTION 706. Computation of Value of Possessory Interest. The value of a possessory interest shall be assessed as provided in this Chapter or any method adopted by the Tribal Business Council pursuant to Section 103 of this Code. The method reflects the reasonable value of the possessory interest which is subject to taxation.

1. Subject of Valuation.

- a. The subject matter of valuation under this Chapter is real and personal property of possessory interest except as exempted under Section 108 of this Code. "Real property" means all lands or interests in land to which title or the right of title has been acquired from the government of the United States on behalf of the sovereign authority of the Tribe and/or lands or interests in land on the Reservation. Real property, moreover, includes all mines, quarries, and minerals in and under the land, and all rights and privileges pertaining thereto; and improvements. "Personal property" means everything which is subject of ownership and which is not included within the term of "real property." "Personal property" includes machinery, equipment, and other articles related to a commercial or industrial operation which are either affixed or not affixed to the real property for proper utilization of such articles. Improvements mean all structures, buildings, furniture, fences, and water rights erected upon or affixed to land, whether or not title to such land has been acquired.

b. For the 1990/1992 tax cycle, two classes of personal and real property shall be the subject matter of valuation as follows:

(i) All real property in mining and extractive activities including the related and associated personal property and improvements.

(ii) All utilities/railroads and their associated and related personal property and improvements thereto.

2. Date of Valuation. All possessory interest which is subject to taxation under this Chapter shall be valued as of the 1st of January of a given calendar year.

3. Valuation for Assessment. The valuation for assessment of all taxable possessory interest shall be one hundred percent (100%) of the actual value thereof as determined by the Tax Commission in the manner described by this Code, and such percentage shall be uniformly applied without exception and discrimination to the actual value of the various classes and subclasses of possessory interest in Reservation lands.

4. Basis of Valuation. The information required for the assessment of actual value for a class of possessory interest during the present tax cycle is that which belongs to the previous tax cycle. If this information is not available, the average for the past five years may be applied. In the ensuing Subsections, the specific nature of the required data is described.

5. Method of Valuation. The value of a possessory interest shall include the ad valorem value of the real and personal property and shall be determined in accordance with the provisions of this Subsection for purposes of possessory interest taxation as follows:

a. All real property in mining and extractive activities including the related and associated personal property and improvements.

(i) The actual value shall be 100 percent of the value as determined by the adjusted gross income of extract-

ing, mining and processing from the Reservation lands less direct costs of such. The Tax Commission shall rely upon the information that the taxpayer submits to other taxing authorities for such purposes.

(ii) The value of land for the purposes of this Subsection shall be set at \$2,800/acre for this tax cycle; and may not be escalated by more than the annual rate of inflation as measured by the annual average rate of the GNP Price Deflator of the preceding year for the succeeding tax cycles.

b. All utilities/railroads and the associated and related personal property and improvements thereto.

(i) Statement of Utility Taxpayer/Tax Commission. Every taxpayer of any utility or lands on the Reservation whose possessory interest is in operational mode or is capable of being in operational mode on the assessment date of any year, shall, no later than March 31st of each year, prepare, sign and file with the Tax Commission showing:

(A) The location thereof, and the name thereof, if there is a name.

(B) The name, address, and interest of the utility taxpayer.

(C) The gross operating revenue, the gross operating expenses and the net income exclusive of any non-utility income and deductions of that portion of the utility facility on the Reservation.

(D) For the utilities subject to the jurisdiction of the FEDERAL REGULATORY AUTHORITIES, the information incorporated in their related forms they file with those authorities shall be adequate. For others, the similar information they file with the state regulatory commissions, authorities shall suffice the purpose.

(ii) On the basis of information contained in such statements as in (i) above, the Tax Commission shall value such utilities/railroads' possessory interests in accordance with the capitalization income method. The value of a possessory interest for utilities/railroads shall be determined, thus, by computing the capitalized value of the net income exclusive of any non-utility income and deductions as a proportion of the utility's facilities on the Reservation. The capitalization rate shall be set at thirteen percent (13%) except when and if the taxpayer demonstrates a different and higher number. The "reasonable" expenses to be incurred in producing the proportional annual net income shall be allowed, and the proper adjustment that the regulatory authorities do not allow to be included in their forms shall also be allowed. Such capitalization shall be done for the remaining life of the possessory interest. If the possessory interest life is indefinite, the life of the possessory interest shall be presumed to be twenty-five (25) years for the purposes of this method.

(iii) The value of land for the purposes of this Subsection shall be set at \$2,800 per acre; and the said value may not be escalated by more than the annual rate of inflation as measured by the annual average rate of the GNP Price Deflator of the preceding year for the succeeding tax cycles.

SECTION 707. Assessment of Tax.

1. The Tax imposed by this Chapter is based upon the return filed by the taxpayer.

2. The Tax Commission shall be authorized to assess taxes against a taxpayer and such assessments are presumed to be correct.

3. When it appears that the return filed by the taxpayer does not reflect the tax due under this Chapter, the Tax Commission shall assess the taxpayer for the deficiency, interest, penalties, and costs.

4. If not return is filed, the Tax Commission is authorized to make an estimate of the tax due, and to assess the taxpayer for that tax, interest, penalties, and costs. The assessment is binding on the taxpayer.

5. If the taxpayer fails to provide information within its possession or control which is relevant to an assessment of taxes due, and which it is required to provide under this Chapter, the Tax Commission is authorized to make an estimate of the tax due and to assess the taxpayer for that tax, interest, penalties, and costs. This assessment is binding on the taxpayer unless it is shown that the estimate, on the basis of the best information available to the Tax Commission, was clearly erroneous.

SECTION 708. Tax Declaration and Designation of Natural Person. Every entity or person owning any non-exempt possessory interest on the interest on the Reservation shall designate a natural person as the individual empowered by the taxpayer to act on behalf of the taxpayer with respect to all matters involving the possessory interest tax. Said designated natural person shall complete the forms distributed by the Tax Commission and shall provide the information required therein.

SECTION 709. Reporting Requirements. Each taxpayer shall comply with the following reporting requirements and such other requirements as are by rules or regulations adopted by the Tax Commission:

1. **Forms.** The Tax Commission shall provide taxpayers with forms for the reporting of the value of all possessory interests to the Tribe. Information reported by the taxpayer on these forms shall be the basis for assessment of tax due.

2. **Reporting Date.** Each taxpayer shall report the value of its possessory interests by March 31st of the year following the tax year. If the date of submittal of the report to the related regulatory authority, as required

in Subsection 706.5.b.(i)(D) is after March 31st, the report for the previous year may be accepted.

3. Extension of Time. Upon timely written request to the Tax Commission, a taxpayer may request an extension of time within which to report the value of its possessory interests; and for good cause shown, the Tax Commission may extend, for a period not to exceed thirty (30) days, the reporting date, but no further extension shall be allowed. Such a request for extension, to be timely, must be received by the Tax Commission prior to the reporting date. Requests for extension received by the Tax Commission after the reporting date shall not be considered. If the Tax Commission extends the date for filing valuation reports for a taxpayer, the date for mailing the notice of tax assessment to that taxpayer provided for in Section 710 of this Chapter shall automatically be extended by the amount of additional time granted the taxpayer for filing the valuation reports.

4. Failure to Report, Administrative Valuation. If a taxpayer fails to file substantially complete possessory interest tax reporting information, or to otherwise provide requested information or documents within its possession or control which are relevant to an assessment of the extent or value of its possessory interests, the Tax Commission may proceed to assess the value of the taxpayer's possessory interests and to assess taxes accordingly. This assessment will be binding on the taxpayer unless it shows that the valuation, on the basis of the best information available to the Tax Commission, was clearly erroneous or unless the Tax Commission for other good cause shown relieves the taxpayer from the operation of this Subsection.

5. Reporting Value of Exempt Interests. No taxpayer or entity shall be required to file property valuation forms for any possessory interest which is exempt under Sections 108 and 406 and other relevant Sections of this

Code, provided that the Tax Commission may require any taxpayer or entity to file the information necessary to establish the claimed tax exemption.

6. Authority of the Tax Commission. The Tax Commission may by form or regulation require any taxpayer to file the information or documents deemed necessary for the proper and efficient administration of the tax.

7. Administrative Reports. The Tax Commission shall report all possessory interest tax activities and collections to the Tribal Business Council at least annually.

8. Amended Returns. Amended returns for assessment may be filed, and will be considered for a period of one year from the date of the original report. After one year, all reports will be considered final.

Any refunds of overpayments as a result of corrected assessment will be paid to the taxpayer.

SECTION 710. Notice of Assessment and Payment of Taxes Due. Notice of tax assessment and of the amount of tax due shall be mailed by the Tax Commission by April 30th of the year following the tax year, unless that date has been extended pursuant to Section 709.3 of this Chapter. The assessed tax shall be paid within thirty (30) days of the date of mailing said notice, unless another date is specified by the Tax Commission in the notice of assessment or the due date has been extended pursuant to Section 711 of this Chapter. Any taxes assessed shall be paid by check or money-order made payable to the Three Affiliated Tribes Tax Commission. Payment is timely made if it is postmarked before midnight on the date on which the tax is due or if it is delivered to the Tax Commission by certified mail or in person and a receipt is given before midnight on the due date.

SECTION 711. Extension of Time for Paying Tax. Upon the filing with the Tax Commission of a timely request for an extension of time within which to pay as-

sessed taxes, and upon a showing of good cause, the Tax Commission may extend, for a period not to exceed forty-five (45) days, the due date for payment of taxes assessed, but no further extension shall be allowed. Such a request for extension, to be timely, must be filed on or before the date the assessed taxes are due. The penalty for late payment as provided for in Section 712 of this Chapter shall not apply to any payment for which an extension has been granted.

SECTION 712. Penalty for Late Payment. Any taxpayer failing to pay the amount of tax assessed by the due date, except in cases where extensions have been granted, shall pay a penalty on the outstanding balance in accordance with the provisions of Chapter 3 of the Code.

SECTION 713. Lien for Taxes.

1. **Lien Against Possessory Interest.** The procedures for placing a lien against the possessory interest shall be according to the provisions of Section 408 of the Code.

SECTION 714. Method of Claiming Exemption. Any taxpayer owning both taxable and exempt possessory interests shall file with the Tax Commission a claim for any exemption. The claims for exemption shall be filed on the form provided by the Tax Commission and at the time of filing the valuation reports required by Section 709, and shall be accompanied by a map clearly indicating the specific property for which exemption is claimed. Any taxpayer owning only exempt possessory interests shall be required to claim such exemptions only at the written request of the Tax Commission.

SECTION 715. Appeal Procedures for Protested Taxes. All administrative and legal remedies are those authorized in Chapter 5, Sections 501-507 of the Code.

SECTION 716. Collection Powers. The Tax Commission, in the name of the Tribe, shall have full power to collect taxes and penalties assessed, including the power to file suit in Fort Berthold District Court or in any other court

of competent jurisdiction, and to execute on any judgment by all appropriate legal remedies including attachment and seizure of the assets of any delinquent taxpayer. The procedures for enforcement are set forth in Chapter 4, Sections 401-409.

SECTION 717. No Waiver of Sovereign Immunity. Any challenge to the validity or application of this Chapter shall be pursuant to Section 104 of this Code.

SECTION 718. Severability. If any part or application of this Chapter is held invalid, the remainder of the Chapter or its application to other situations or taxpayers shall not be affected.

SECTION 719. Use of Tax Proceeds. The use of proceeds shall be approved by the Tribal Business Council to defray the costs of providing essential governmental services on the Reservation and for other purposes as approved by the Tribal Business Council.

SECTION 720. Amendment. This Chapter may be amended by resolution passed by the Tribal Business Council in accordance with the Constitution of the Tribe. The Tax Commission shall notify taxpayers of any amendments in the manner considered appropriate by the Tax Commission under Tribal laws.

SECTION 721. Effective Date. This Chapter shall be effective on the date of its adoption by the Tribal Business Council, subject to review by the Secretary pursuant to the Constitution and the By-laws of the Tribe.

SECTION 722. Conflict With Other Applicable Law. In the event of a conflict between provisions of this Code and any other provision of applicable law that by its terms is applicable to taxation, this Code shall supersede and be controlling.

APPENDIX B

THREE AFFILIATED TRIBES • FORT BERTHOLD RESERVATION

MANDAN, HIDATSA, AND ARIKARA TRIBES
TAX COMMISSION

Tribal Administration Buildings
P.O. Box 1058
New Town, North Dakota 58763
(701) 627-3226

May 31, 1991

RE: *CLARIFICATION OF TRIBAL JURISDICTIONAL
AUTHORITY*

Dear _____:

This letter is written to clarify the misconceptions regarding the possessory interest tax code of the Three Affiliated Tribes.

Public hearings were held in Bismarck, North Dakota on the 17th and 18th days of April, 1991. The purpose of the public hearings was to present you with the tribal possessory interest tax code and to, in turn, offer you the opportunity to submit your written comments and concerns to the Tribe regarding the proposed tax code.

Everyone in attendance at the public hearings was informed that the Code was not in final form and that any comments or suggestions duly submitted would be considered by the Tribal Business Council. The Tribal Business Council may, within its discretion, determine that it will allow certain exemptions. However, on the other hand, the Council could determine not to create any exemptions at all. The final determination for the implementation of the possessory interest tax is completely within the total discretion of the Tribal Business Council. The Legal Department, tax department and tax commission can make certain recommendations; however, the final draft of the

tax code, and its implementation thereto, will be determined by the Tribal Business Council. If the Tribal Business Council, chooses to incorporate agriculture into the tax code, the Council will be well within their legal authority to do so. If the Tribal Business Council chooses to exempt fee lands for the first (1st) year tax year, the Council may create this exemption or it may not. Due to the lateness for the implementation of the Tribe's possessory interest tax, the Legal Department in conjunction with the tax department may recommend that the Tribal Business Council create certain exemptions; however, the Tribal Business Council, as the Governing Body, will make the final decision on the granting of and tax exemptions.

The Tribal Business Council of the Three Affiliated Tribes recognizes that its power to levy taxes are two-fold, to wit: its governmental authority to regulate its own territory and, with respect to non-members, its powers to exclude them from the reservation.

The Tribal Business Council recognizes that chief among its powers of sovereignty is the power of taxation, which may be exercised over members of the Tribe and over non-members insofar as said non-members may accept such privileges of, but not limited to, trade, residence and commercial dealings to which taxes may be attached as conditions. Furthermore, the Tribal Business Council recognizes the principles of federal Indian law whereby Indian tribes possess the power to tax transactions of non-Indians when said activity involves the Tribe or its members unless the Congress has unequivocally and expressly divested the Tribes of jurisdiction by federal law.

The Tribal Business Council of the Three Affiliated Tribes in order to enhance the social welfare, health, and security and economic well-being of the residents of the Fort Berthold Reservation duly passed the implementation of the possessory interest tax. The Tribal Business Council recognizes its inherent sovereign authority for the

implementation of taxes for the purposes of generating revenue for essential governmental services to all residents of the reservation. The Tribe recognizes its sovereign powers to tax within the territorial boundaries of the Fort Berthold Reservation. The Supreme Court has never stated that Indian tribes do not possess the power to tax fee lands. The Supreme Court has stated, however, that in many instances there exists concurrent taxing authority by both the States and the Indian Tribes to tax activities occurring within the boundaries of a reservation.

In conclusion, the Tribal Business Council recognizes the legal principles enunciated by the Supreme Court, that Indian tribes may regulate, through *taxation*, licensing or other means, the activities of non-members who enter into consensual relationships with the Tribe or its members.

With best regards, I remain

/s/ P. Diane Johnson
PATRICIA DIANE JOHNSON
Staff Attorney
Three Affiliated Tribes
New Town, North Dakota 58763

cc: To all in attendance at the Public Hearings held April 17 & 18, 1991 at Bismarck, North Dakota, and to all of those individuals and organizations who submitted comments to the Tax Department.

APPENDIX C

THREE AFFILIATED TRIBES • FORT BERTHOLD RESERVATION

MANDAN, HIDATSA, AND ARIKARA TRIBES
TAX COMMISSION

Tribal Administration Buildings
P.O. Box 1058
New Town, North Dakota 58763
(701) 627-3226

June 24, 1991

Dear _____:

Thank you for your comments and concerns expressed in your letter, dated May 8, 1991. Following is the Tax Commissions reply to your questions you have presented to us.

The Three Affiliated Tribes has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and do business. This sovereign power attaches to all lands within the exterior boundaries of the Fort Berthold Reservation. The Tribal Business Council has decided to tax those oil, gas, utility and railroad activities located on the entire reservation, including any facilities and lines of those entities to be taxed which are located upon fee lands, which is their right. Those persons who own fee lands which are used for agricultural or other private business purpose will not be subject to the Possessory Interest Tax, excluding of course those entities subject to be taxed under section 708 of the Tribal Tax Code.

The following definitions of Land Ownership have been provided by Mr. Arnie Guimont, Realty Specialist for the Bureau of Indian Affairs, in New Town, ND.

Trust Land:

Land that the title is held in trust by the United States for the benefit of a Tribe or Individual Indian.

Restricted Land:

Lands where the title is vested in an individual Indian with restrictions against encumbrances and alienation.

Fee Land:

Lands where a fee simple patent has been issued by the United States.

The methodology for using \$2,800 per acre as the value of land was established by the Federal Energy Regulatory Commission and is known as the Opportunity and/or Avoidance Cost. The basis for this cost is computed by taking the difference between what it would cost your company to go around the Fort Berthold Reservation, with your power lines, compared to what it would cost to go through the Reservation. The land value of \$2,800 per acre is approximately fifty percent of what it would cost to construct your power lines around the exterior boundaries of the Fort Berthold Reservation.

The question concerning depreciation can best be answered with the fact that your companies do use depreciation each year you figure your State and Federal Income Tax. So it is a deductible item to you.

In regards to Section 408.1, "Lien Against Possessory Interest", All taxing authorities (state, federal, county and city) require a first lien against all property and rights to property of the taxpayer in favor of that taxing authority to secure payment of any taxes, penalties and interests that become due. This lien will only affect your ability to obtain a loan should Oliver-Mercer Electric and other Cooperatives fail to timely file and pay their taxes.

The Gross Operating Income, on Line 4, Schedule B, is the Gross Income for your entity. This figure should be the same one submitted to State and Federal Governments when figuring your yearly Income Tax.

The Possessory Interest Tax, by-way-of resolution, was implemented December 13, 1990. Where by the Possessory Interest Tax is to be paid in 1991, using production and income information obtained from 1990 actual figures.

Enclosed you will find a copy of the Tribal Constitution and Bylaws, for the Three Affiliated Tribes.

Thank you again, Mr. ———, for your comments and concerns. We will notify you of the date and time of the upcoming workshop and if we can be of any further assistance, please don't hesitate to call.

Sincerely,

/s/ Tom Needham
TOM NEEDHAM
Assistant Executive Director

APPENDIX D

THREE AFFILIATED TRIBES • FORT BERTHOLD RESERVATION
MANDAN, HIDATSA, AND ARIKARA TRIBES
TAX COMMISSION

Tribal Administration Buildings
P.O. Box 1058
New Town, North Dakota 58763
(701) 627-3226

August 8, 1991

Dear _____:

Due to requests received by the Tax Commission regarding an additional period in which to submit information requested at the Bismarck, North Dakota and New Town, North Dakota meetings, the due date for this information has been extended. The new due date will be August 23, 1991.

In addition, due to the cancellation of projects planned for the reservation by the companies which may become subject to the Possessory Interest Tax, no other extension will be deemed warranted. Several of the companies in question have stopped projects until a final decision has been made by the Tribal Business Council. A rational, intelligent decision, as I am sure you are well aware, should not be made until all facts are received and analyzed. But, due to the above stated circumstances, a decision will be forthcoming shortly after the August 23, 1991, deadline utilizing information the Tax Commission has at that time.

Your assistance in this matter has been greatly appreciated.

Sincerely,

/s/ Joseph J. Walker
JOSEPH J. WALKER
Tax Commissioner/
Executive Director

APPENDIX E

Resolution No. 85-244-e

RESOLUTION OF THE GOVERNING BODY OF
THE THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD INDIAN RESERVATION

WHEREAS, This Nation having accepted the Indian Reorganization Act of June 18, 1934, and the authority under said Act; and

WHEREAS, The Constitution of the Three Affiliated Tribes generally authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, The Reservation Telephone Cooperative of Parshall, North Dakota is extending telephone service lines through out the Fort Berthold Reservation for the benefit of members of the Three Affiliated Tribes, and

WHEREAS, The right-of ways for the telephone lines are considered "Beneficial Right-Of-Ways", as they provide a much needed service to tribal members, and

WHEREAS, The Reservation Telephone Cooperative is a member owned [cooperative] and any additional charges for access or damages would be charged to the end user,

NOW THEREFORE BE IT RESOLVED, Telephone Rights-of-Way will be processed with out access fees or damages accessed to the cooperative on those lands owned by the Three Affiliated Tribes.

CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, hereby certify that the Tribal Business

Council is composed of 11 members of whom 7 constitutes a quorum, 8 were present at a Regular Meeting, thereof duly called, noticed, convened, and held on the 12 day of December 1985; that the foregoing Resolution was duly adopted at such meeting by the affirmative vote of 7 members, 1 members opposed, 0 members abstained, 0 members not voting, and that said Resolution has not been rescinded or amended in any way.

Chairman (voting)

Dated this 12 day of December, 1985.

/s/ [Illegible]
Secretary,
Tribal Business Council

ATTEST:

/s/ [Illegible]
Chairman,
Tribal Business Council

APPENDIX F

§ 319. Rights-of-way for telephone and telegraph lines

The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the former Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding \$5 for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the trans-

mission of messages over any lines constructed under the provisions of this section; *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

(Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1083.)

APPENDIX G

Office of Legislative and Intergovernmental Affairs
Office of the Assistant Attorney General

Washington, D.C. 20530

[22 Aug. 1988]

Honorable Orrin Hatch
135 Russell Senate Office Building
Washington, D.C. 20510

Subject: S. 2747; "Indian Civil Rights
Act Amendments of 1988"

Dear Senator Hatch:

I am writing in support of S. 2747, a bill to amend the Indian Civil Rights Act of 1968, 82 Stat. 77-78 (Public Law 90-284) (Title II of the Civil Rights Act of 1968). The amendment strengthens enforcement of the ICRA by providing federal courts with carefully structured jurisdiction to enforce individual rights under the Act.

The amendment is necessary, in our view, because existing ICRA compliance procedures fail to fully protect rights secured by the ICRA. In some cases, for example, tribal courts do not exist. In other circumstances, tribal courts may lack authority to review actions of tribal governments. In addition, sovereign immunity and other jurisdictional barriers may limit the ability of tribal courts to effectively enforce the ICRA. Finally, because many tribal courts are subordinate to other branches of tribal government, judicial independence suffers; the lack of a meaningful separation of tribal powers may result in an impermissible interference with the work of tribal courts.

1. *Introduction*

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-3, fills the void left by the Constitution's failure

to limit or restrict tribal authority. See, *Talton v. Mayes*, 163 U.S. 376 (1896). The Act provides "for the American Indian the broad constitutional rights afforded to other Americans," and thereby "protect individual Indians from [unwarranted] actions of tribal governments". *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)). While the ICRA contains many of the protections found in the Constitution, except for habeas corpus, it is unenforceable in federal courts. Instead, tribal forums enjoy exclusive jurisdiction of civil actions brought to enforce the ICRA. *Santa Clara Pueblo*, *supra*. The enforcement of such basic guarantees as free speech, due process and equal protection are wholly dependent on the effectiveness of tribal institutions and procedures—often the same tribal institutions and procedures alleged to have violated the act. We understand that the purpose of the proposed amendment is to remedy tribal non-compliance with the ICRA by providing access to federal district courts. Federal district court jurisdiction, together with a right of action by aggrieved individuals or the Attorney General, will check current compliance problems and assure a meaningful ICRA enforcement program.

Although tribal measures to enforce the ICRA are available in theory, such remedies may be unavailable in practice. Nearly one-half of all tribal governments, for example, have no tribal court. Where tribal courts exist, they may lack the power to review legislative or executive action, suffer jurisdictional impediments or be subordinate to the tribal council. Since the Supreme Court's decision in *Santa Clara Pueblo*, *supra*, the available literature, including the Report of the Presidential Commission on Indian Reservation Economies, and a number of federal court decisions, question the effectiveness of ICRA enforcement in tribal court. Allegations of ICRA violations also surfaced recently in hearings

held by the United States Commission on Civil Rights. In testimony taken in Washington, D.C., Rapid City, South Dakota, Flagstaff, Arizona, and Portland, Oregon, a number of Indians and non-Indians shared evidence of non-compliance with the ICRA.

In order to assure that rights secured by the ICRA are enforced fully, change in the existing compliance procedure—including expanded access to federal district courts—is critical. Federal district court ICRA enforcement jurisdiction, coupled with the requirement of exhausting available tribal remedies and the other limitations built into the amendment, balance legitimate tribal interests with a meaningful and effective ICRA compliance program. Without the amendment proposed here, or one very similar, individual rights guaranteed by Congress will remain a largely unfulfilled promise; one which continues to protect individual rights in theory but not in practice.

2. *Failure to Enforce the ICRA Fully Post Santa Clara Pueblo*

For 10 years prior to *Santa Clara Pueblo*, *supra*, the ICRA was routinely enforced in both tribal and federal courts. In fact, there is a strong presumption that an effective ICRA enforcement program encourages capital investment, jobs and tribal economic development generally. See, *e.g.*, *Report and Recommendations To The President Of The United States*, Presidential Commission On Indian Reservation Economies, November, 1984. At least three factors, however, contribute to current ICRA non-compliance at the tribal level: first, judicial review may be unavailable or limited; second, tribal sovereign immunity and other jurisdictional impediments may bar or limit ICRA relief; and, third, tribal governing bodies may interfere with tribal courts.

a. *The Lack of Meaningful Judicial Review*

Tribal courts lack clear authority to review tribal government action. See, Ziontz, *After Martinez: Civil*

Rights Under Tribal Governments, 12 U.C. Davis L. Rev. 1, at 10-12 (1980). In some tribes, judicial review may be limited or not exist at all. Tribal courts are available in only about one half of the nation's nearly 300 federally recognized Indian tribes. See, e.g., *Santa Clara Pueblo*, *supra*. In other tribes, judicial review may be limited. The Cheyenne River Sioux Tribe, for example, explicitly reserves final authority over tribal action to tribal councils and not tribal courts. A recent Cheyenne River resolution states in part:

BE IT FINALLY RESOLVED, that the Council shall retain the power to review the decision of the Tribal Court of Appeals on issues of law under such conditions and procedures as are found by the Council to be appropriate.

Cheyenne River Sioux Tribal Resolution No. 213-85-CR. Still other tribal councils address judicial review on a case-by-case basis. See, for example, Oglala Sioux Tribal Resolution No. 87-76 which provides in part:

WHEREAS, the Oglala Sioux Tribe has reviewed the actions of the Tribal Court and Tribal Court of Appeals in the *Moore* case and find that the said courts have exceeded their authority under Ordinance No. 86-09, now

THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council hereby declares that all court orders in the case of *Margaret Moore v. Oglala Sioux Tribal Personnel Board, et al.*, are hereby declared null and void.

Elsewhere the rule may not be as clear, but the same tribal body against which suit has been filed may be also called upon to determine its propriety. See, *Runs After v. United States*, 766 F.2d 347, 353 (8th Cir. 1985), citing Justice White's dissent in *Santa Clara Pueblo*.

b. *Sovereign Immunity and Other Jurisdictional Barriers to ICRA Enforcement in Tribal Court*

In addition to those tribes which have no court or refuse to permit full judicial review, some tribes further frustrate meaningful ICRA enforcement by relying on the doctrine of sovereign immunity. For example, former Cheyenne River Chairman Morgan Garreau provided the following testimony to the United States Commission on Civil Rights:

MS. MILLER: Do you believe that sovereign immunity is a bar to Indian Civil Rights Act claims against the tribe [in tribal court]?

MR. GARREAU: Yes, I do. [The question] has come to the tribal council with regard to [a] waiver of sovereign immunity. As I stated, I sat on the tribal council. I served as administrative officer. At no time during those years, I believe from 1979 to the present [1986], has the tribal council ever waived sovereign immunity for anyone, for any case or cause at all.

MS. MILLER: So what that means is you are saying that the Indian Civil Rights Act really is unenforceable as against the tribe?

MR. GARREAU: Unless the council waives sovereign immunity.

MS. MILLER: Which it hasn't done.

MR. GARREAU: No, they have not, for anyone.

Hearings, *supra*, at p. 377.

Cheyenne River is not an isolated case. Tribal court decisions which dismiss or limit ICRA actions by invoking sovereign immunity have occurred in a number of jurisdictions. For example, in *Satiacum v. Sterud*, No. 82-1157 (Puy. Tr. Ct., April 23, 1982), 10 Indian L. Rep. 6013, the Puyallup Tribal Court rejected the argument that *Santa Clara Pueblo* "represents an explicit waiver of the tribe's immunity" in an ICRA action in

tribal court. *Id.* at 6015. See, also, *Whatoname v. Hualapai Tribe et al.*, Civil No. 003-80 (Hualapai Ct. of App., May 11, 1981) (The tribal court dismissed an ICRA case commenting that "[i]t is difficult for this Court to fathom how the Indian Civil Rights Act can be said to waive the immunity of the Tribe in its own Courts by implication while such waiver by implication was expressly rejected by the federal courts". Unreported slip op. at 8). In *DuBray v. Rosebud Housing Authority*, No. CIV83-01 (Rosebud Sioux Tr. Ct., Feb. 1, 1985), 12 Indian L. Rep. 6015 (*app. pdg.*, South Dakota Intertribal Ct. of App.), the tribal court found "no provision in the tribal code which would waive the tribe's immunity to suits based on claims under [the ICRA]". *Ibid.* Therefore, the tribal court continued, "because the tribe's immunity has not been waived, the plaintiffs' [ICRA] complaint must be dismissed." *Ibid.*

The Colville Tribal Court, relying in part on a tribal ordinance which held that "the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties," dismissed a reapportionment suit against the tribal Business Council brought pursuant to the ICRA. *Colville Confederated Tribes Business Council v. George*, No. CV84-402, (Colv. Tr. Ct., Nov. 8, 1984), 11 Indian L. Rep. 6049, 6050. See, also, *Garman v. Fort Belknap Community Council*, No. CV83-238, (Ft. Blkp. Tr. Ct. Jan. 20, 1984), 11 Indian L. Rep. 6017 (ICRA case dismissed against tribal defendants with the observation that the tribe has "not chosen to expressly waive tribal sovereign immunity to allow enforcement of the Indian Civil Rights Act in tribal courts") and the cases cited by Johnson and Madden, *Sovereign Immunity In Indian Tribal Law*, 12 Am. Indian L. Rev. at 167, n. 59 (1984).

In cases where sovereign immunity presents no bar to ICRA enforcement, other jurisdictional considerations

may intervene. For example, tribal court civil jurisdiction may be limited to cases in which both parties are members of the tribe or each consent to tribal court jurisdiction. See, *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981) ("[A]ccess was denied to tribal court". *Id.* at 685. (Holloway, J., dissenting)).

c. *The Lack of Judicial Independence Contributes to ICRA Non-Compliance*

Although some tribal courts may be successful in establishing the principle of judicial review and, further, may even overcome serious jurisdictional barriers such as the doctrine of sovereign immunity, other obstacles may still impede the full enjoyment of rights secured by the ICRA. Tribal governing bodies, for example, may interfere with the process of tribal courts. While there may be the appearance of ICRA enforcement at the tribal level, the reality is often impaired by a lack of tribal separation of powers or judicial independence. The 1984 Report of the Presidential Commission on Indian Reservation Economies found that the

failure [of tribal governments] to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on [tribal] governmental functioning. For example, the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law.

Report And Recommendations To The President Of The United States, supra, Part One, 29.

Recent hearings before the United States Commission on Civil Rights provides further evidence that tribal courts may be preempted in their effort to enforce rights

secured by the ICRA. Former Chief Judge Trudell Guerue of the Rosebud Sioux Tribal Court wrote that there is an "absence of any forum in which the Indian Civil Rights Act is enforceable." Guerue, *The Indian Civil Rights Act—How it is Used As License And Not As Protection*, 1986, 3 (unpublished paper in the files of the United States Commission On Civil Rights). This is true, according to Guerue, because tribal councils control tribal courts; "removal from office or the bench is not an uncommon tribal council tool." *Id.* at 4. This lack of judicial independence or separation of tribal powers was echoed by a number of other Indian judges. For example, former tribal judge Walter Woods of the Cheyenne River Sioux Tribe testified before the Civil Rights Commission that tribal

judges are politically appointed so they can be controlled by the council. If they make decisions that are not favorable with the council, then they will be removed without a hearing—because I know; I was one of the individuals that was removed.

Hearings before the United States Commission on Civil Rights. Rapid City, S.D., 1986, 392. Former Cheyenne River Sioux Tribal Chairman Garreau confirmed that "[a]ll it takes is just an action of the tribal council to remove a judge." *Id.* at 383.

A number of federal court decisions further underscore the lack of an independent tribal judiciary. In *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir.) cert. denied, 459 U.S. 907 (1982), the Eighth Circuit noted that "because of [a tribal court] ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the tribal Executive Committee, who quashed Judge Red Shirt's orders." *Id.* at 650. Similarly, in *Runs After v. United States*, *supra*, the Eighth Circuit found that after the tribal court upheld a contested voting redistricting plan "the Tribal Council terminated the tribal court judge * * * and appointed a new

tribal court judge." *Id.* at 348. In addition, the tribe "forever barred" the original *Runs After* judge from tribal political or elective office. Resolution No. 190-84-CR, Cheyenne River Sioux Tribe, July 12, 1984. *Id.* at 349.

3. *The Need To Expand Federal District Court ICRA Jurisdiction*

With the exception of habeas corpus authority, ICRA enforcement is now left exclusively to tribal forums. The Supreme Court's dicta that tribal forums are "available to vindicate rights created by the ICRA", *Santa Clara Pueblo*, *supra*, at 65, has, in some cases, not proved accurate. The failure to establish tribal courts, the lack of judicial review, the doctrine of sovereign immunity, jurisdictional barriers, and tribal council interference with tribal courts are some of the factors which impede full tribal enforcement of rights secured by the ICRA. Administrative solutions, including budget priority and more training for tribal judges, while important, solve only part of the problem; standing alone such remedies fail to address the systemic or institutional factors discussed above.

Several federal court decisions recognize the anomaly of creating statutory rights without an adequate enforcement mechanism or remedy. In *Garreaux v. Andrus*, 676 F.2d 1206 (8th Cir. 1982), for example, the Eighth Circuit acknowledged "that the plaintiffs are being treated unfairly by the tribal council" but, citing *Santa Clara Pueblo*, went on to hold that federal courts lack statutory authority to consider ICRA claims. *Id.* at 1210, n. 2. See also, *Shortbull v. Looking Elk*, *supra*; and *R. J. Williams Co. v. Fort Belknap Housing Authority*, 509 F. Supp. 933, 939 (D.C. Mont. 1981), rev'd and remanded on other grounds, 719 F.2d 979 (9th Cir. 1983), cert. denied, 472 U.S. 1016 (1985) ("This case illustrates the absurd results that the broad rule of [*Santa Clara Pueblo*] can cause.").

Courts, however, properly defer to congressional action. In *Wells v. Philbrick*, 486 F. Supp. 807 (D.S.D. 1980), for example, the court said

[i]t certainly may be argued that the effect, after *Santa Clara Pueblo*, of the ICRA is to create rights while withholding any meaningful remedies to enforce them, but it is for Congress, not the Courts, to resolve this state of affairs [citing *Santa Clara Pueblo*, 436 U.S. at 72].

Id. at 809 [citation omitted].

Evidence of non-compliance with rights secured by the ICRA is important because, as the Court noted in *Santa Clara Pueblo*,

Congress' authority over Indian matters is extraordinarily broad * * * Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.

Id. at 72. In fact, the Presidential Commission on Indian Reservation Economies has made such a recommendation. The Commission, in its November 1984 report, recommends

that legislation be provided for appellate review of tribal court decisions to the federal court system where constitutional or statutory rights are involved.

Report And Recommendations To The President, supra, Part One at 30.

Support for federal court ICRA enforcement authority can be found in the literature as well. Professor Wilkinson, for example, argues "that federal judicial review of tribal action is often appropriate and perhaps should be expanded". Wilkinson, *American Indians, Time, and the Law*, Yale Univ. Press, 1987, 113. A similar view was

voiced by Gover and Laurence. In discussing the need to modify both *Santa Clara Pueblo*, *supra*, and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), they suggest that:

[t]he legislative branch seems well-suited to judge the sophistication of Indian judicial systems * * *. [A legislative] modification of [*Santa Clara*] to grant a careful and not overly disruptive federal oversight of [tribal] jurisdiction might be acceptable. We leave the details of such legislation in the capable hands of Congress * * *. It would place a scalpel back in the federal judge's hand * * *

Gover and Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation In Federal Court of Civil Actions Under The Indian Civil Rights Act*, (Symposium on Indian Law), 8 Hamline L. Rev. 497, 523 (1985).

A number of tribal judges also recognize the need for federal court ICRA jurisdiction. Judge Sambroak of the Rosebud Sioux Tribal Court provided the following testimony to the United States Commission on Civil Rights:

MR. MCDONALD: Do you believe the ICRA should be amended to allow [a] private right of action in federal court?

JUDGE SAMBROAK: Yes.

Hearings, before the United States Commission on Civil Rights *supra*, at 250. Chief Judge Lorraine Rousseau of the Sisseton Wahpeton Sioux Tribal Court echoed the same theme when she told the Civil Rights Commission:

I guess what I'm saying is there may be a need for limited jurisdiction by the federal courts in certain cases.

Briefing Before the United States Commission on Civil Rights, Washington, D.C., February, 1986, at 196.

4. Conclusion

Santa Clara Pueblo, which held that federal courts lack jurisdiction after 10 years of ICRA enforcement, was premised on the assumption that “[t]ribal forums are available to vindicate rights created by the ICRA.” *Id.* at 65. The record now shows serious tribal “deficien[cies] in applying and enforcing” the ICRA. Accordingly, we look to Congress, as did the Court in *Santa Clara Pueblo*, to permit “civil actions for injunctive or other relief to redress violations of [the ICRA].” *Id.* at 72. Systemic, institutional factors, including the lack of judicial review, jurisdictional impediments, sovereign immunity and the failure to provide for effective judicial independence, often contribute, as a practical matter, to the failure to enforce fully rights secured by the ICRA post *Santa Clara Pueblo*.

As tribal governments flourished under the policy of self-determination, the number of tribal courts autonomous from the federal government has also grown. In addition to providing for federal court ICRA enforcement authority, the legislation contains a number of incentives to strengthen and further develop tribal courts. Specifically, the amendment encourages tribal courts to resolve ICRA complaints by requiring individuals to exhaust tribal remedies before seeking a federal court solution, by limiting federal relief to equitable remedies, by requiring federal courts to adopt tribal findings of fact if certain circumstances are met, and by providing for deference to tribal court interpretation of tribal laws and customs.

We believe that the carefully constructed approach to federal jurisdiction contained in this bill is consistent both with our goal to provide an effective and meaningful ICRA compliance process and with the principle that “federal courts must avoid undue or intrusive interference in reviewing tribal court procedures.” *Smith v.*

Confederated Tribes of Warm Springs, 783 F.2d 1409, 1412, (9th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 465, 93 L.Ed. 2d 410. As in federal habeas corpus cases under section 203 of the Act, it is anticipated that “where the tribal court procedures under scrutiny differ significantly ‘from those commonly employed in Anglo-Saxon society,’ *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976), courts [will] weigh ‘the individual right to fair treatment’ against ‘the magnitude of the tribal interest (in employing those procedures)’ to determine whether the procedures pass muster under the Act.” *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988), *quoting Stands Over Bull v. Bureau of Indian Affairs*, 442 F.Supp. 360, 375 (D.Mont. 1977), *appeal dismissed*, 578 F.2d 799 (9th Cir. 1978).

Federal district court ICRA jurisdiction, coupled with the limitations built into the amendment, *e.g.*, exhaustion of tribal remedies, relief limited to equitable remedies and tribal incentives to resolve IRCA complaints locally, balances legitimate tribal interests with a meaningful program to protect individual statutory rights. Access to federal courts reverts to the pre-*Santa Clara Pueblo* status quo and guarantees those the ICRA was enacted to protect an effective statutory enforcement forum.

We are informed by the Office of Management and Budget that the views expressed in this letter are in accord with the program of the President.

Sincerely,

/s/ Thomas Boyd
 THOMAS M. BOYD
 Acting Assistant Attorney General
 Office of Legislative Affairs

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U.S. Department of Justice
Civil Rights Division

[SEAL]

Office of the Assistant Attorney General

Washington, D.C. 20530

[Jun. 12, 1991]

Honorable Nicholas J. Spaeth
Attorney General
State of North Dakota
600 East Boulevard
State Capitol
Bismarck, North Dakota 58505

Re: *Indian Civil Rights Act Amendments*

Dear General Spaeth:

I am writing concerning our mutual interest in achieving full compliance with the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*

For some time now both the Department of Justice and the Conference of Western Attorneys General have urged Congress to amend ICRA to provide federal courts with enforcement jurisdiction. Your resolutions of 1989 and 1990 and our letter to Senator Hatch of March 1, 1991, a copy of which is enclosed, point out serious non-compliance with the ICRA on the part of some tribal governments.

I am pleased to report that I met recently with Senator Hatch who said he shares our concern. Furthermore, he believes hearings on this important issue are both timely and appropriate. I am certain that Senator Hatch would welcome a letter from you and other western Attorneys General, concerning the need for full ICRA

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enforcement. Accordingly, I would encourage you to write to him with your thoughts on how this may be achieved and your previous call for ICRA oversight hearings.

If I can be of any assistance, please do not hesitate to write or call me on (202) 514-2151.

Sincerely,

/s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

Enclosure

APPENDIX H

CONGRESSIONAL RECORD—SENATE

Proceedings of the 101st Cong., 1 Session Vol. 135 Washington, Monday, March 6, 1989, No. 23.

By Mr. HATCH:

S. 517. A bill to provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes; to the Committee on the Judiciary.

INDIAN CIVIL RIGHTS ACT AMENDMENTS

Mr. HATCH. Mr. President, I rise today to introduce the Indian Civil Rights Act Amendments of 1989.

TRIBAL GOVERNMENTS AND SOVEREIGNTY

* * * *

While the decisions of these tribal governments reflect the history, culture, religious convictions, and shared values of the tribal leaders and members, the process of tribal government is largely based on a constitutional model. Most tribes, for example, are constitutional in nature and organized pursuant to the Indian Reorganization Act—Wheeler-Howard Act—of 1934. Very few, the Southwest Pueblos are the notable exception, have religious or other traditional forms of Indian governments.

Constitutionally, tribal governments differ from most State and Federal governments. Some of the fundamental checks and balances existing within the Federal and State constitutional framework, for example, are not present at the tribal level. Real power in many tribal governments rests with the tribal council or legislative branch. Tribal councils pass the ordinances, resolutions and other processes which create tribal law. Through

standing committees in such areas as social welfare, law enforcement, or the judiciary, tribal councils then perform executive management, and implementation functions as well. The tribal councils often micromanage tribal programs and their function is substantially different from the more general oversight role performed by non-Indian legislative bodies.

Separation of powers into coequal branches of government in order that one may check the potential abuse of another is not a concept well-established in tribal governments. As a result, tribal governments may lack pluralism, respond more to majority concerns, and ignore minority interests.

In that context, tribal courts exist in only about one-half of the tribal governments. Where courts do exist, they are often a creation of the tribal council and, therefore, subject to and dependent on the council. Rarely do tribal courts exist constitutionally as a separate coequal branch of the tribal government. As a consequence, tribal courts may lack the powers to review tribal council actions, may be otherwise limited jurisdictionally, and may lack independence from the tribal council or tribal chairman.

Tribal governments, because they are neither Federal nor State instruments and because they predate the Constitution, are not restricted by Federal or State constitutional authority. Similarly, tribal governments are not bound by many Federal civil rights statutes including, for example, civil actions for deprivations of statutory or constitutional rights, 42 U.S.C. section 1983, the Voting Rights Act, 42 U.S.C. 1973, and laws prohibiting discrimination in employment, 42 U.S.C. 2000e-1.

THE 1968 INDIAN CIVIL RIGHTS ACT

However, Congress has plenary power over Indian matters. This exceptionally broad congressional authority is

found in article I, section 8, clause 3 of the Constitution, which gives Congress the power to "regulate commerce * * * with Indian tribes." In an exercise of its plenary power, the Senate Judiciary Subcommittee on Civil and Constitutional Rights heard complaints of civil rights violations by tribal governments. The subcommittees held hearings from 1960-1967 and documented widespread civil rights abuses on the part of tribal governments generally.

This record of civil rights abuses by tribes led to the enactment, over objection by tribes, of the Indian Civil Rights Act, as title II of the Civil Rights Act of 1968. The Act applies substantial portions of the Constitution's Bill of Rights and the 14th amendment to tribal government in much the same way that the Federal Bill of Rights restricts the Federal Government. As set out in title II, section 202 of the Indian Civil Rights Act:

* * * *

In deference to Indian tribal values, however, certain constitutional provisions, including the first amendment's prohibition against establishing religions, were omitted. Other concessions were made to Indian tribal governments and values. Tribes, for example, need not provide indigent criminal defendants with counsel. Much of the concern, and the ultimate concessions, centered on the financial impact of granting broad rights to individuals who come in contact with tribal governments.

EARLY ENFORCEMENT

For 10 years, from 1968 and 1978, the Indian Civil Rights Act was routinely enforced in both tribal and Federal courts. Each Federal appellate court which considered the Indian Civil Rights Act; that is, the Fourth, Eighth, Ninth, and Tenth Circuit Courts, found the act within Congress' power and inferred a private right of action in Federal court to enforce the act's provisions.

The number of reported Federal district court cases between 1968 and 1978 was substantially less than 100 or roughly 10 per year nationwide. One way to read such a statistic is to see the positive impact or value that possible Federal civil rights enforcement has on encouraging tribal compliance with the act. Certainly the tribal exhaustion requirement which Federal courts routinely read into the act tended to resolve many issues at the tribal level without the need for Federal court action.

To be sure, there is little, if any, evidence that between 1968 and 1978 tribal governments suffered substantially as a result of the limited Federal court Indian Civil Rights Act enforcement. For example, there is no evidence that any tribe was forced to terminate its tribal government functions or became insolvent as a result of the act. In fact, there is some evidence that the act had a salutary effect on tribal government by, among other things, checking tribal abuse, providing for a more pluralistic tribal government, and encouraging nonreservation capital investment.

For the most part, pre-1978 Indian Civil Rights Act decisions enforced the act within the context or framework of existing tribal traditions, customs, and values. In due process cases, for example, Federal courts looked to tribal law or customs for a definition of what process was due. Tribal defense in equal protection litigation often relied on tribal "rational basis"; that is tribal law or custom, not available to non-Indian governments.

TERMINATION OF FEDERAL COURT REVIEW OF INDIAN CIVIL RIGHTS ACT ABUSES

Federal court review came to an end in 1978 with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). There, the Supreme Court said the Indian Civil Rights Act does not provide for a waiver of sovereign immunity and, further, the acts fails to provide a private right of action for individuals in

Federal court. The court found two distinct and "competing" purposes in the act: First, to protect individuals from tribal abuse of power; and second, to promote Indian self-government. Although the court found that Congress has the power to provide a Federal forum, it said to do so may limit tribal court power and, thereby, lessen or infringe on tribal sovereignty or self-government. Accordingly, the court reused to read in the Indian Civil Rights Act a right of action in Federal court which was not explicitly contained in the act. The court went on to warn the tribes, however, that if they were deficient in applying and enforcing the act, Congress may in the future provide for Federal relief.

CRITICISM OF THE LACK OF FEDERAL COURT REVIEW

Over the last few years, substantial criticism has been raised over the burden often placed on plaintiffs by the Santa Clara Pueblo decision. While some tribal governments have gone to great lengths to ensure enforcement of the Indian Civil Rights Act guarantees, such is not the case with all tribes. In a 1984 report by the Presidential Commission on Indian Reservation Economies, the commission attacked the fairness of some tribal government proceedings. In its report, the commission states:

[Failure to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on governmental functioning. For example, the failure to establish a clear separation of powers between the tribal courts, weakening their independence, and raising doubts about fairness and the rule of law. * * * Both Indians and non-Indians complain of political discrimination against them by tribal governments and tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally

managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.

Similar criticism has also been raised by the Federal courts. In the case of *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982), the 8th Circuit Court of Appeals reviewed a case in which the plaintiff claimed that he was wrongfully refused permission to run for tribal office by an action of the tribal council. In addressing the lack of protection for the plaintiff's rights under the Indian Civil Rights Act, the court stated:

We must, however, express serious concern that Shortbull's rights under [Sec.] 1302 of the Indian Civil Rights Act (ICRA) may never be vindicated. Shortbull alleges that the tribal court, Chief Judge Red Shirt, ruled that he was entitled to run in the primary election because of the Tribal Council's January 24 resolution. It appears that because of this ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the Tribal Executive Committee, who quashed Judge Red Shirt's orders. Such actions raise serious questions under the Indian Civil Rights Act, but because the Supreme Court determined in *Santa Clara Pueblo* that there is no private right of action under the IRCA. Shortbull has no remedy. * * *

We are thus presented with a situation in which Shortbull has no remedy within the tribal machinery nor with the tribal officials in whose election he cannot participate [citations omitted], unless and until Congress provides otherwise. [Citing *Santa Clara Pueblo*.] We questioned whether such a result is justified on the grounds of maintaining tribal autonomy and self-government: it frustrates the ICRA's purpose of "protect[ing] individual Indians from the arbitrary and unjust actions of tribal govern-

ments," and in this case it renders the rights provided by ICRA meaningless.

The Tenth Circuit Court of Appeals also attacked the current enforcement situation in the case of *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). In one of the few non-habeas corpus Indian Civil Rights Act cases to provide a federal forum by narrowly construing the Santa Clara Pueblo decision, the court provides some useful insights with reference to the facts and the resulting lack of fairness in that case:

Plaintiffs Cook, who are non-Indians, had owned the 160-acre tract for about ten years and had lived there. They decided to build a guest lodge for hunting, and consulted the superintendent of the reservation about the matter. He advised them that projects of this type were encouraged to provide employment. He also stated that there would be no access problem. A license to plaintiffs Cooks was issued for the business. The individuals then formed Dry Creek Lodge, Inc. to build the facilities. This was done with an SBA loan. The lodge was completed and opened, but the next day the tribes closed the road at the request of a nearby Indian family. . . .

The [tribal Joint Business Council directed that access to the Dry Creek Lodge be prevented by the federal officers, and the [Indian family] were apparently to erect the barricade. With the road blocked the persons on the Dry Creek land could not get out and were for all practical purposes confined there until a federal court issued a temporary restraining order. Thereafter the plaintiffs sought a remedy with the tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed. 25 C.F.R. Sec. 11.22.

The consent was not given. The state court cases were removed to the federal court. In the federal court the defendants urged that there was no remedy—no jurisdiction. * * * The Tribal Business Council according to the minutes, directed that the differences between the [Indian] family and the plaintiffs be settled by self-help, and this was done. The plaintiffs, however, did not respond the same way. The defendants argue here, as they did in the trial court, that the plaintiffs have no remedy. There is no forum where the dispute can be resolved and the personal property rights asserted by plaintiffs be considered. * * *

The plaintiffs alleged that their personal and property rights under the Constitution had been violated by the defendants. A jury so found and awarded damages. There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have no remedy. The self-help which was suggested to shut down plaintiffs' "business," according to the Council minutes, and which was carried out with the help of the federal police, does not appear to be a suitable device to determine constitutional rights.

In that case, even the dissenting judge acknowledged that dilemma when he stated:

To me this is a most, disturbing case because of the result I feel compelled to reach. The jury found a violation of the plaintiffs' civil rights recognized by [section] 1302 of the Indian Civil Rights Act, under the most distressing circumstances. And yet it seems we must say that the doors are closed against any orderly redress for the wrongs. State and federal courts are barred by the immunity doctrine from hearing the claims and access was de-

nied to the tribal court, as the majority opinion points out. * * *

[T]hese damages claims are * * * barred * * * unless and until Congress provides otherwise.

Only recently, this criticism by the Federal courts of the status quo was reaffirmed by the U.S. District Court for the District of Montana in the case of Little Horn State Bank versus Crow Tribal Court. After a lengthy review of the facts in which the plaintiff was repeatedly denied his rights by the defendant, the Judge went on to state:

This Court is well aware of the continued promotion of tribal self-government and self-determination. In *National Farmers Union Ins. Co. v. Crow Tribe* [citation omitted], the Supreme Court directed the federal district court to give tribal legal institutions the "proper respect" by staying its hand in order to allow the Tribal Court a "full opportunity to consider the issues before them." [Citation omitted.] This Court, in keeping with its obligation to uphold the law, will honor that directive.

However, it has become extremely difficult to do so in the face of such decidedly egregious facts as are presented herein. Plaintiff has recognized the sovereignty of the Tribe and has valiantly tried to operate within the Tribal Court system, seeking its approval of a valid judgment entered in the courts of the State of Montana, and assistance in enforcing the same. The Crow Tribal Court, acting as a sort of "kangaroo court" has made no pretense of due process or judicial integrity. Plaintiff was met not only with bias and uncooperativeness, but with a blatantly arbitrary denial of any semblance of due process. The tribal judge's conduct makes a mockery of any orderly system of justice, and renders any attempt to deal with the Tribe in a professional and

competent manner a farce. The Court seriously questions whether the conduct of the Tribal Court is befitting the title of a sovereign, and the respect and deference customarily accorded along with that status.

It would appear that the Crow Tribal government changes judges at a whim, to the detriment of non-Indian litigants, and of the Tribe. As a result, the Tribal Court lacks any continuity and uniform precedent which is the foundation of our judicial system. While the tribal members enjoy the protection of their rights under both the United States Constitution and the ICRA, depending on the forum. It appears that non-Indians are not granted the same privilege of dual citizenship in Tribal Court. If the Crow Tribe wishes to earn the respect and cooperation of its non-Indian neighbors, it must do more to engender that respect and cooperation, not abuse those neighbors who attempt to work within its system.

Let me reiterate that these abuses that are cited by the courts are not necessarily occurring in all or even a majority of the tribal governments. Nevertheless, the situation was serious enough to warrant congressional action in 1988, and it appears that at least with some tribes such is still the case.

THE NEED FOR LEGISLATION

The concerns of the courts that I have been quoting are further supported by an extensive record of the lack of Indian Civil Rights Act enforcement that is currently being compiled by the U.S. Civil Rights Commission. For the last couple of years, the Commission has been holding a series of hearings on this issue. While the Commission's report is not yet complete, the transcripts and hearing records contain many statements that further support the allegations of failure by some tribal governments to ade-

quately enforce the civil rights guaranteed to both tribal and nontribal reservation residents alike.

Because of the enforcement problems that have occurred since the Santa Clara Pueblo case, the time has now come to follow the Supreme Court's dictum and legislate a Federal court remedy. A review of post-Santa Clara Pueblo Federal and tribal case-law, existing Federal studies, news reports, and other available information, makes clear that rights secured by the Indian Civil Rights Act have been less than fully enforced.

In earlier testimony before the U.S. Civil Rights Commission, the Department of Justice provided some interesting statistics and background with respect to its involvement and monitoring of Indian Civil Rights Act enforcement. I would like to share some of that testimony with my colleagues at this point:

In the 7 years prior to Santa Clara, the Department of Justice received about 230 complaints of ICRA violations on the part of tribal governments. ICRA complaints during this period accounted for just over 18% of all civil rights complaints involving Indians. Several of these matters were settled by informal discussion between the Department and the affected tribes. Others were not pursued because of non-ICRA commitments on [the part of the Department]. The Department did, however, participate in 6 federal civil lawsuits which raised ICRA issues, including 2 brought solely on ICRA claims. No cases have been brought subsequent to Santa Clara. Most complaints brought to the Department's attention pre-Santa Clara involved allegations of tribal election irregularities. Other alleged violations occurred in the area of tribal employment, law enforcement, i.e. police and court irregularities, and housing assignment policies.

Since the Court's 1978 decision in Santa Clara, the Justice Department has received about 45 ICRA

complaints alleging violations of the civil rights of Indians by tribal governments. No action has been taken on any complaint and no effort has been made, post Santa Clara, to invoke the jurisdiction of the federal courts. Seventeen complaints allege tribal court irregularities including a failure to allow retained attorneys to appear in tribal court, a failure to permit defendants an opportunity to be heard and the failure to afford criminal defendants a trial by jury. Thirteen complaints allege flaws in the tribal election process including improper interference by the tribal council, fraud and malapportioned election districts. Six complaints allege improper tribal hiring practices including political interference and nepotism. Four complaints allege housing violations including noncompliance with tribal housing assignment policies, favoritism and improper interference by the tribal council. The remaining miscellaneous complaints range from an alleged failure to provide tribal benefits equally to all members (similar to the Santa Clara facts) to an allegation of unsanitary and inadequate tribal jail conditions.

The following incidents are representative of the more serious complaints received by the Department since Santa Clara and, to our knowledge, which have gone unreviewed by federal courts. On March 13, 1979 a tribal member was arrested for disorderly conduct by tribal officials. An investigation of the circumstances surrounding his arrest, trial and punishment revealed the following information. The victim was held without bail in pretrial confinement for 5 days. On March 18, 1979 he was transported from the jail and taken to a room containing tribal officials. All other persons were removed from the room. The victim was forced to kneel in front of the tribal officials. He was told that he was charged

with disorderly conduct and asked several questions concerning his arrest on March 13th. He was never informed of the statutory rights set out in the ICRA. After a time, a tribal official asked that a rawhide whip about 2 feet long be brought in the room. When it arrived, the official instructed a subordinate to whip the victim four times, which was done. The victim was sentenced to 30 additional days in jail and returned to jail without medical attention. Other information confirms that the victim's account is an accurate description of how trials are conducted at the tribe. Non-public proceedings, no representation by counsel, no notification of procedural rights and whippings are all customary in criminal proceedings.

A Southwest tribe is districted into several separate council districts. Federal courts have held that the due process clause of the ICRA requires that trial council districts comply with one person, one vote requirements. However, the 1982 election districts exceed the maximum permissible derivation by approximately 200-400% depending upon population base used. A recent redistricting has reduced that deviation to approximately 70%.

In a 1982 complaint, an attorney wrote [the Department] alleging that a tribe refused to permit him to represent his client. The attorney alleged that his client was required to present a case in tribal court while the attorney was present "but only as an observer". According to the attorney's account, when he spoke up on behalf of his client, members of the tribal council tried to have him "removed from the courtroom altogether." He concludes his letter with the observation that "[t]he tribal court system is a total mockery of justice at best and more realistically a fraud" on the tribal members. Subsequently the attorney was "removed" from the reservation by tribal law enforcement au-

thorities. In a February 20, 1985 letter, a tribal member wrote to complain that she and others "have been cheated in tribal elections". She also complained that tribal members are "coerced into compliance thru[sic] fear of losing their jobs and our civil rights have been flagrantly violated." She told [the Department] that she "cannot be identified for fear of job reprisal". Finally, [the Department] received a September 6, 1985 letter from an Indian who requested our "help in protecting [tribal members] from our government". Following the submission of a recall petition, the tribal council went through the signatures systematically "giving people the choice of being suspended from employment or publicly apologizing for signing the Petition". The letter continues with the allegation that the "Council is threatening us * * * All we want is the right to vote and elect our leaders. We understand this is supposed to be a real right, but so far there is no avenue for enforcement.

In a recent letter from the justice Department to the U.S. Commission on Civil Rights, the Department provides a summary of complaints it has received since the Santa Clara Pueblo decision. Mr. President, I ask unanimous consent that a copy of that letter and the incident summary be included in the Record immediately following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH, Mr. President, while abuse of rights by individual tribal officials has surfaced since Santa Clara Pueblo; for example, allegations that tribal judges fail to insist on proper standards prior to issuing search warrants, structural problems are also present and, arguably, more important.

Examples of structural Indian Civil Rights Act problems include the failure of tribal governments to insist

on independent judicial review or an equally effective Indian Civil Rights Act compliance procedure. Some tribal governments fail to create tribal courts or, where they do exist, extend to them the power of judicial review.

For example, recent news reports out of my home State of Utah indicate that last year a tribal judge on the Ute Indian Reservation was dismissed from his position by the reservation Business Committee when the judge found the committee in contempt of court for failure to pay more more than \$500 million in back dividends to new tribal members. While the news articles are not detailed as to all of the specific facts of that case, they do point out that the tribal government has passed a new law prohibiting legal action against the tribe in tribal court. If that is the case, and I believe that it is, then given the Supreme Court ruling in Santa Clara Pueblo that Indian civil rights actions may not be brought in Federal courts, it would appear that at least on the Ute reservation there is no possibility of enforcing the 1968 Indian Civil Rights Act in cases involving the tribal government.

This situation and other complaints regarding lack of enforcement of the Indian Civil Rights Act warrant serious congressional action in the form of hearings. We must determine the scope of the problem and take corrective action in the form of legislation to ensure that individuals will have their civil rights enforced.

Efforts have been made to increase Federal funding and provide effective training programs for tribal systems. However, while appropriate funding and training levels are important, they will not resolve the Indian Civil Rights Act enforcement problems that do exist. The remedy lies with Federal court enforcement. Federal court enforcement, coupled with a requirement of exhaustion of tribal remedies and limited to equitable relief, will achieve the goal to providing an effective Indian Civil

Rights Act compliance program without unnecessarily limiting other legitimate tribal goals.

The bill that I am introducing today does just that. It provides for Federal court review and enforcement after an individual has exhausted his or her tribal remedies. The bill will also prohibit the defense of sovereign immunity in civil rights cases. It is a fair and balanced solution to ensure that all citizens, both Indian and non-Indian, enjoy basic civil rights.

* * * *

Mr. President, the bill that I am introducing today strikes a legitimate balance between the interests of the tribal governments in exercising their powers of self-government and the rights which Congress extended to individuals through the 1968 Indian Civil Rights Act. It was endorsed by the administration last year and I am reintroducing it in the same form. I would encourage my colleagues to carefully examine this issue and support this effort to protect the rights of all Americans.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

* * * *

SEP 12 1991

IN THE
Supreme Court of the United States OFFICE OF THE CLERK
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN
RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL;
BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD
PERSON, CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIR-
MAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C.
COBELL, TREASURER
and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/
ACCOUNTANT,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY BRIEF

Of Counsel:

EDMUND W. BURKE
THOMAS H. CATALANO
BURLINGTON NORTHERN
RAILROAD COMPANY
777 Main Street
Fort Worth, Texas 76102
MICHAEL E. WEBSTER
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P.O. Box 2529
Billings, Montana 59103-2529

November 12, 1991

BETTY JO CHRISTIAN
Counsel of Record
CHARLES G. COLE
MARK A. MORAN
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8113
Attorney for Petitioner

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-545

BURLINGTON NORTHERN RAILROAD COMPANY,
v. *Petitioner,*

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN
RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL;
BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD
PERSON, CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIR-
MAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C.
COBELL, TREASURER and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/
ACCOUNTANT, *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY BRIEF

Review of the Ninth Circuit's decision is necessary to preserve the coherence of tribal sovereignty jurisprudence and avoid an arbitrary patchwork of law. The briefs filed by respondents the Fort Peck Tribal Executive Board *et al.* and The Blackfeet Tribe of the Blackfeet Indian Reservation *et al.* (collectively, the "Tribes") only serve to underscore the importance of the questions presented and the need for a harmonizing decision by this Court.

I.

Neither the Ninth Circuit nor the Tribes have reconciled the rulings below with the tribal sovereignty principles this Court articulated in *Montana v. United States*, 450 U.S. 544 (1981). They have instead sought to avoid those principles by contending that different sovereignty rules apply in a variety of circumstances. That contention is flatly at odds with the coherent framework established by *Montana* and subsequent decisions of this Court.

A.

Respondents approach tribal sovereignty as balkanized terrain. They contend that there is one set of rules for taxing nonmembers on trust lands, another for regulating their activities on “fee” lands, and yet another for exercising criminal jurisdiction over them. See *Ft. Peck Br.* at 12-16; *Blackfeet Br.* at 7-12.

Nothing could be further from the plain language of *Montana*, nor more destructive of consistent treatment of tribal relations with nonmembers. *Montana* specifically addressed “the principles of inherent sovereignty,” and expressly did so from a general perspective. See 450 U.S. at 563-66. It looked from “the first Indian case to reach this Court,” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), to a then-recent case involving tribal criminal jurisdiction, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to articulate “general principles of retained inherent sovereignty.” *Id.* at 565. As the Court explained, those general principles “support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Id.*

Montana admitted only two exceptional circumstances in which a tribe might “exercise some forms of civil jurisdiction over non-Indians on their reservations.” *Id.* Under the exception at issue here,

[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who

enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Id. (citations omitted). The Tribes' urgings that these principles are of limited scope, applicable only to fee land on reservations and isolated from questions of taxation, ignore both the words and the reasoning of this Court.

The Tribes' limitation of *Montana* to fee land, Ft. Peck Br. at 13-14; Blackfeet Br. at 7-8, is directly at odds with the *Montana* Court's analysis of "general principles of retained inherent sovereignty" and articulation of a "general proposition" regarding the inherent sovereign powers of an Indian tribe over nonmembers. 450 U.S. at 565.¹ The "consensual relationship" requirement that must be met in order for tribes to "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians" applies to all such persons "on their reservations, even"—but not solely—"on non-Indian fee lands." *Id.* Indeed, *all* of the cases *Montana* itself cited as examples of the "consensual relationship" exception involved nonmember use of *trust* lands.

Moreover, a distinction between "fee" and "trust" lands is particularly inappropriate as applied to railroad rights-of-way. Whether a particular right-of-way from the Federal government takes the form of a fee or an easement, the railroad's use "is, and necessarily must be, exclusive." *Choctaw, O. & G. R.R. v. Mackey*, 256 U.S. 531, 539 (1921). Tribes are powerless to interfere with a railroad's use of such a right-of-way. *See* Pet. at 17-18. Distinctions between the power of a tribe over trust lands

¹ To the extent *Montana* held that a tribe may regulate hunting and fishing on trust lands, *id.* at 557, it only applied the general principles it set forth. Because the tribe in that case had the power to exclude nonmembers from hunting and fishing on trust lands, the arrangements it made with them to permit such activities plainly created a consensual relationship permitting regulation. *See United States v. Montana*, 604 F.2d 1162, 1166-69 (9th Cir. 1979), *aff'd in part & rev'd in part*, 450 U.S. 554 (1980).

and over fee lands—whatever relevance they may have in other contexts—are simply inapplicable to a railroad right-of-way granted by the Federal government. Indeed, this Court has observed that it “is wholly immaterial whether the rights vested in the [railroad] corporation by the act of Congress were rights of ownership or merely those which result from the grant of an easement. *Whatever they are, they were taken out of the reservation by virtue of the grant . . .*” *Maricopa & P. R.R. v. Arizona*, 156 U.S. 347, 352 (1895) (emphasis added).

The Tribes’ argument does not even make sense on its own terms. While they assert that their power to tax flows from their retained sovereignty, respondents insist on a distinction based on land ownership. But a power to tax derived from and limited by ownership is, in essence, a power to charge for entry onto the land. And the Tribes plainly lack such power with respect to interstate railroad rights-of-way. *See* Pet. at 17-18.

The suggestion that *Montana* has no application to tax matters, Ft. Peck Br. at 12-13, is contradicted by its specific reference to taxation as one form of regulation by which tribes may exercise jurisdiction over nonmembers if, but only if, the requisite conditions exist. *See* 450 U.S. at 565.² *Montana* itself reconciled two of the key tax cases cited by the Tribes; as the Court explained, both *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Morris v. Hitchcock*, 194 U.S. 384 (1904), involved precisely the sort of consensual relationships that will permit taxation. 450 U.S. at 565-66; *see also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 427 (1989) (plurality opinion) (noting reconciliation of *Montana* and *Colville* on this basis).³ The other decisions

² The Blackfeet respondents concede that *Montana* applies to taxation on fee lands. Blackfeet Br. at 11 n.6.

³ While the Tribes claim that BN conceded their power to tax on trust lands, it is obvious that the statements on which they rely

of this Court on which respondents rely, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), both involved taxes on activities conducted pursuant to mineral leases that a tribe had entered into with nonmembers, and thus can be reconciled with *Montana* on exactly the same grounds.⁴

There is, in any event, nothing in the later tax cases to suggest that the carefully-reasoned limits *Montana* placed on tribal authority over nonmembers had somehow been modified.⁵ It is unthinkable that this Court, having expressly placed taxes within the *Montana* rule and shown how its two prior tax cases were consistent with that rule would the very next Term, in *Merrion*, reverse field and place taxation under a substantially looser standard. It is even more unthinkable that the Court would do so without even bothering to cite *Montana*. And *Kerr-McGee*, an opinion that simply relied on *Merrion*, cannot conceivably be read to have effected any change in the law.

Cases such as *Merrion* do, however, appear to have led lower courts to ignore *Montana* in tribal taxing cases. Certain language in *Merrion* can cause mischief if it is read in isolation from *Montana*, and by doing just that the Ninth Circuit's decision will only serve to exacerbate the problem. It is for these reasons, as the Tribes' own

merely noted that, under *Colville*, taxation is permissible to the extent it satisfies the *Montana* standards.

⁴ Indeed, all of the lower court decisions on which the Tribes rely involved such consensual relationships. See, e.g., *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983) (tax on mineral leases); see also Pet. at 15 n.11. Those cases thus offer no support for the Ninth Circuit's decision.

⁵ The Tribes are wrong in suggesting that *Merrion* negates any requirement of consent in the tax context. See Ft. Peck Br. at 15; Blackfeet Br. at 12 (quoting 455 U.S. at 147). All the quoted language indicates is that, once a nonmember has entered into a consensual relationship with a tribe sufficient to support tribal regulation, there need not be specific consent to a particular tax.

arguments illustrate, that this Court should grant review and lay such confusion to rest.

B.

The question whether the *Montana* principles apply to tribal taxation of nonmembers cannot be avoided based on the Ninth Circuit's offhand suggestion that the result would be the same under those principles. *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, 904 n.7 (9th Cir. 1991), Appendix to Petition ("Pet. App.") at 11a n.7. The lower court's one-sentence footnote asserting that BN has a "consensual relationship" with the Tribes reduces the necessary consent to mere presence and wrongly focuses on the consent of the tribe rather than that of the party being taxed.

As the *Brendale* plurality explained, "*Montana* itself necessarily decided" that a nonmember's mere presence within reservation boundaries does not create a consensual relationship. 492 U.S. at 428. And as BN has shown, the presence of its transcontinental lines on reservations now occupied by the Tribes was the result of right-of-way grants directly from the Federal government, not any relationship between the Tribes and the railroad. See Pet. at 3-4; see also *id.* at 19-20 & n.16.⁶

The Tribes' arguments that they have consented to BN's presence on the reservation, Ft. Peck Br. at 16; Blackfeet Br. at 12-14, are wholly misplaced. What they characterize as tribal consent to BN's rights-of-way was no more than general acquiescence in the Federal government's retention of the ability to grant such rights in its own discretion. See Pet. at 19-20. Indeed, this Court has held that Congress has authority to use its power of emi-

⁶ The Blackfeet respondents offhandedly suggest that BN "is a third-party beneficiary of the agreement between the Tribe and the United States." Blackfeet Br. at 15 n.12. But this argument actually cuts the other way, since a third party beneficiary is, by definition, a stranger to the contract, and its consent is irrelevant. See Restatement (Second) of Contracts § 306 cmt. a (1979).

nent domain to grant a right-of-way across a reservation over the objections of the tribe. See *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 656 (1890).

More important, the argument that taxation can be based solely on a tribe's acquiescence to the presence of a nonmember on its reservation turns the idea of consent on its head. As this Court has recently explained, what matters is not the consent of the tribe, but the consent of the party over whom tribal authority is being asserted; such authority cannot be extended "over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 110 S. Ct. 2053, 2064 (1990) (citing *Merrion*, 455 U.S. at 172-73 (Stevens, J., dissenting)).

The question of consent presents another issue on which this Court's guidance would benefit lower tribunals: the significance that a tribe's power to exclude nonmembers from reservation lands has in determining its power over them. Since *Merrion*, that issue has loomed as one that could serve to bring the concept of retained tribal sovereignty into sharper focus. See 455 U.S. at 168-173, 175 (Stevens, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

That concern can be addressed with particular clarity in the context of an interstate railroad right-of-way. Consistent with its goal of establishing transportation corridors to open the West, the Federal government granted BN the exclusive use and occupancy of these rights-of-way; moreover, to protect the public interest in access to interstate transportation, Federal law prohibits any effort to prevent BN's railroad operations over them. See Pet. at 17-18. Under governing Federal law, the Tribes have no power to exclude BN from access to the property. *Id.* If such power is essential to a tribe's authority over nonmembers, this case frames the issue in stark relief.

II.

BN is not alone in recognizing the serious and widespread implications that the Ninth Circuit's decision will have on the Nation's railroads and on the fabric of tribal relations with nonmembers and state and local governments.⁷ Indeed, the Tribes do not contest the importance of this case to the railroad industry, the sweeping impact of the Ninth Circuit's Indian law decisions, or the likelihood that the lower court's ruling will encourage other tribes to impose railroad and utility taxes such as these. *See Pet. at 28-30.*

Nor do they deny that the taxes at issue here discriminate against nonmembers and indeed were designed to shift the costs of tribal government to those who cannot avoid having their interstate operations cross reservation lines. *See Pet. at 28.*⁸ The suggestion that railroads and other interstate utilities can protect themselves against

⁷ Six states (the "States"), the Association of American Railroads ("AAR") and a telephone cooperative have also urged the Court to grant BN's petition.

⁸ The Fort Peck respondents argue that the impact of taxes on nonmembers can be ignored if the tax falls on "utilities that have chosen to use reservation trust lands owned by Indians." *Ft. Peck Br. at 17.* That argument again equates mere presence with consent to be subject to tribal taxation. *Compare Brendale*, 492 U.S. at 428. It also ignores the fact that it was the Federal government, not BN, that selected the route for BN's right-of-way and thus caused it to cross the reservations. *See AAR Br. at 17-18.*

The Tribes also endeavor to portray this as a situation in which taxes merely reflect the costs of having a railroad or utility traverse a reservation. *Ft. Peck Br. at 11-12 n.13; Blackfeet Br. at 18.* But the general availability of police and fire protection to those present on a reservation cannot in and of itself create a consensual relationship. *See Brendale*, 492 U.S. at 428. Nor can the availability of such services excuse the impact of an impermissible tax. In any event, BN is billed directly by the Bureau of Indian Affairs for the costs of responding to fires on the reservations caused by railroad operations. *See Exhibit E to BN's Reply Brief in Support of Motion for Preliminary Injunction, Burlington Northern R.R. v. Fort Peck Tribal Executive Board*, No. CV-87-055-CF (filed Apr. 20, 1987).

discriminatory taxation by lobbying tribal governments, Blackfeet Br. at 17, blinks at the reality of the situation—the closed nature of tribal society and government.

There is no substance to the Tribes' contentions that the "substantial federal control" to which they are subject precludes the possibility of discriminatory taxes on nonmembers. See Ft. Peck Br. at 17; Blackfeet Br. at 15-16. As the Tribes themselves recognize, Federal approval of tribal taxes such as these is not always required. See Blackfeet Br. at 16 n.12 (citing *Kerr-McGee*). Even where necessary, such review hardly is designed to protect the interests of nonmembers and, as this case demonstrates, does not in fact prevent discrimination. The review is conducted by an agency whose task is to serve as the guardian for Indian tribes and whose role in practice is to further their financial interests. Under these circumstances, it is not surprising that when there is Federal review, it is perfunctory. See AAR Br. at 7-8 n.7 (Fort Peck tax approved "the next day" after being submitted to the Bureau of Indian Affairs).

Finally, the alleged congressional policies in favor of "economic self-sufficiency" and "self-determination" invoked by the Fort Peck respondents, Ft. Peck Br. at 18-20, are beside the point. There is no evidence that Congress intended such policies to override the law of tribal sovereignty established by this Court. To the contrary, there is every reason for strict adherence to the limits that law places on tribal power, particularly where failing to do so would conflict with other Federal policies seeking to protect the economic health of the railroad industry. See Pet. at 25-27.

The Ninth Circuit's decision encourages the adoption of new or additional taxes such as these on more than 55 reservations over which major railroads must conduct their operations. See AAR Br. at 5-6, 1a-3a. The impact of the decision beyond the railroad industry will be even greater, for it will not only subject other utilities to tribal

taxation but also seriously interfere with "the development of coherent principles for structuring the relationships among states, tribes, and individual citizens." States' Br. at 15.

CONCLUSION

For all of these reasons and for the reasons stated in the Petition, the writ of certiorari should be issued.

Respectfully submitted,

Of Counsel:

EDMUND W. BURKE
THOMAS H. CATALANO
BURLINGTON NORTHERN
RAILROAD COMPANY
777 Main Street
Fort Worth, Texas 76102
MICHAEL E. WEBSTER
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P.O. Box 2529
Billings, Montana 59103-2529

November 12, 1991

BETTY JO CHRISTIAN
Counsel of Record
CHARLES G. COLE
MARK A. MORAN
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8113
Attorney for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
PETITIONER

v.

BLACKFEET TRIBE OF THE BLACKFEET
INDIAN RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

EDWARD J. SHAWAKER

VICKI L. PLAUT
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTION PRESENTED

Whether an Indian tribe may tax the value of a railroad right of way that belongs to a nonmember, and that crosses tribal trust lands, only if the tribe has a consensual relationship with the nonmember.



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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

This case concerns the authority of the respondent Indian Tribes to tax the value of railroad rights of way that cross reservation lands held in trust for the Tribes by the United States. Both courts below upheld the tribal taxes, relying primarily on this Court's decisions in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (*Merrion*), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (*Colville*).

1. Petitioner, the Burlington Northern Railroad Company, operates the largest railroad system in the United States. 1991 *Moody's Transportation Manual* 1. In 1990, petitioner transported some 305 million tons of freight, including coal, grain, and industrial and forest products. *Id.* at 14. Those operations generated revenues in excess of \$4.6 billion. *Id.* at 4.

Petitioner succeeded to its main northern line from the St. Paul, Minneapolis, and Manitoba Railway Company. Br. in Support of Mot. for Prelim. Inj. in *Fort Peck* 5. See *The Official Railway Guide* B11, B23-B24 (November/December 1991). At issue here are two portions of the line: an 84-mile stretch across the Fort Peck Reservation, located in the northeastern part of the State and occupied by the Assiniboine and Sioux Tribes, and a 58.18-mile stretch across the Reservation of the Blackfeet Tribe, located in the northwestern part of the State. See *Fort Peck Br. in Opp.* 4; *Blackfeet Br. in Opp.* 1.

The land underlying these two stretches of track is held in trust for the Tribes by the United States. On each Reservation, the track is crossed by roads used by tribal members and nonmembers alike.¹ Petitioner's operations have sometimes caused fires and accidents along the rights of way. CR 16 in *Fort Peck*, Exh. 11, ¶ 11; CR 8 in *Blackfeet*, Att. 1, ¶ 11.

2. The Tribes' federally recognized interest in their Reservations dates back to 1855. In that year, the United States created, by treaty, one massive Reservation for the Blackfeet and other signatory Tribes. Treaty With the Blackfoot Indians, Oct. 17, 1855, 11 Stat. 657; see also Act of Apr. 15, 1874, ch. 96, 18 Stat. 28. Between 1886 and 1887, the Blackfeet, Assiniboine, and Sioux Tribes entered into an agreement with the United States to create separate Fort Peck and Blackfeet Reservations out of portions of the 1855 Reservation. Article VIII of that agreement (Pet. App. 55a) provided:

¹ In 1986, 6536 members and 2315 nonmembers resided on the Blackfeet Reservation. Clerk's Record (CR) 8 in *Burlington Northern R.R. v. The Blackfeet Tribe, et al.*, No. CV-87-120-GF (D. Mont.), Att. 1, ¶ 4 (*Blackfeet*). In 1987, 5400 Indians resided on the Fort Peck Reservation, and nonmember residents numbered in the thousands. CR 16 in *Burlington Northern R.R. v. Fort Peck Tribal Executive Bd.*, No. CV-87-55-GF (D. Mont.), Exh. 11, ¶ 2 (*Fort Peck*). The two cases were considered together by the district court and consolidated by the court of appeals. Pet. App. 2a n.1.

[W]henever in the opinion of the President the public interests require the construction of railroads * * * through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

Congress ratified the agreement in the Act of May 1, 1888, ch. 213, 25 Stat. 113, 115-116 (Pet. App. 54a-56a).

After the Tribes signed the agreement, but before passage of the 1888 Act, Congress enacted separate legislation authorizing petitioner's predecessor-in-interest—the St. Paul, Minneapolis, and Manitoba Railway Company—to apply for a right of way through Indian reservation lands in a portion of northern Montana that included what is now the Fort Peck Reservation. Act of Feb. 15, 1887, ch. 130, 24 Stat. 402 (1887 Act). The 1887 Act required the company to compensate the Indians for the right of way, and provided that “[the] operation of [the] railroad shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.” § 4, 24 Stat. 403.

In 1890, petitioner's predecessor obtained a right of way across the Fort Peck Reservation pursuant to the 1887 Act and a right of way across the Blackfeet Reservation pursuant to the 1888 Act. Pet. App. 21a, 24a-25a, 42a; Blackfeet Br. in Opp. 3 n.4.

3. The Fort Peck and Blackfeet Tribes enacted the taxes challenged here in 1986 and 1987. The Tribes concluded that their existing taxes (*e.g.*, on oil and gas production and timber harvesting) were insufficient, especially in light of decreased federal funding for tribal services, such as police and fire protection and emergency medical services. See CR 16 in *Fort Peck*, Exh. 11, ¶¶ 4-10, 13-18; CR 8 in *Blackfeet*, Att. 1, ¶¶ 2-4, 6-7. Both

tax laws were adopted following a period for public comment and were approved by the Secretary of the Interior, through the Bureau of Indian Affairs (BIA). CR 11 in *Fort Peck*, Exhs. 5, 6.²

The Fort Peck Tribes impose an *ad valorem* tax on all utility property on reservation trust land, except utility property valued at less than \$200,000 or owned by the Tribes or the United States. Pet. App. 57a-61a. Non-exempt utility property, which includes petitioner's right of way, is generally taxed at 3% of its assessed value. *Id.* at 58a. The value is "presumed to be equal to the full value per linear mile of the utility as assessed by the State of Montana." *Ibid.*; see Mont. Code Ann. §§ 15-23-201, 15-6-145 (1990). Taxpayers may, however, elect any other valuation method that is "reasonabl[e] and accurate[]." Pet. App. 59a.

The Blackfeet Tribe imposes a 4% "possessory interest tax" on the value of "any non-exempt interest in real property" on its Reservation, including interests "held under an easement or right-of-way." Pet. App. 64a-65a. The Blackfeet law exempts property used as a homesite, farm, or ranch; commercial property used in retail sales or service; and any government property (tribal, federal, state, or local) or utility property that exclusively serves the Reservation. *Id.* at 66a-67a. The value of a possessory interest is deemed to be its "market value [as] stated on the assessment books of the county assessor," *id.* at 65a, although, as under the Fort Peck law, the taxpayer may choose an alternative valuation method, *id.* at 66a.

4. Petitioner challenged the Fort Peck and Blackfeet taxes in the United States District Court for the District of Montana.³ On cross-motions for summary judgment,

² Each Tribe was required by its constitution to obtain the Secretary's approval of such tax measures. Fort Peck Const. Art. VII, § 3, CR 11 in *Fort Peck*, Exh. 3; Blackfeet Const. Art. VI, § 1(h).

³ Both the Fort Peck and Blackfeet tax laws prescribe administrative review procedures and provide for subsequent review in tribal courts. Blackfeet Br. in Opp. App. 9-10; Mem. in Support of

the district court sustained the taxes. Pet. App. 16a-47a. It began by noting that “[petitioner] concedes, as it must, the general power of the various Indian tribes to tax the transactions of non-Indians which occur on trust lands and significantly involve a tribe or its members.” *Id.* at 20a; see also *id.* at 18a-19a (citing *Merrion* and *Colville*). The court then held that the lands underlying petitioner’s rights of way are trust lands, rejecting petitioner’s argument that the Tribes’ property interests in the lands were extinguished by the 1887 and 1888 Acts. Pet. App. 24a-35a, 41a-47a. The court likewise rejected petitioner’s arguments that the Railroad Revitalization and Regulatory Reform Act (4R Act), 49 U.S.C. 11503 *et seq.*, abrogated the Tribes’ power to tax and that the tribal taxes violate the 4R Act’s ban on discriminatory state taxes (see 49 U.S.C. 11503(b)) and the Interstate Commerce Clause (Art. I, § 8, Cl. 8). Pet. App. 36a-40a.

5. The court of appeals affirmed. Pet. App. 1a-15a.⁴ Like the district court, it began with the principle enunciated in *Merrion* and *Colville* that “the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.” Pet. App. 6a (quoting *Merrion*, 455 U.S. at 137, and *Colville*, 447 U.S. at 152). Applying that

Mot. to Dismiss in *Fort Peck*, Exh. 1, at 2-3, 8-12. Petitioner did not avail itself of those procedures, and respondents accordingly moved to dismiss petitioner’s actions for failure to exhaust tribal remedies. The district court denied the motions, and the court of appeals affirmed that ruling. Pet. App. 3a n.2. The exhaustion issue is not raised in this Court.

⁴ As an initial matter, the court of appeals held that sovereign immunity required dismissal of petitioner’s claims against the tribal legislative and executive bodies. Pet. App. 4a, 15a. The court allowed the claims against tribal officials to stand, however, holding that sovereign immunity does not bar claims for prospective relief against tribal officials who have allegedly violated federal law. *Id.* at 5a. No issues of sovereign immunity are presented in this Court.

principle, the court of appeals rejected petitioner's arguments that the Fort Peck and Blackfeet taxes are invalid because "(A) the rights of way are not on trust lands, (B) [petitioner's] activities * * * do not significantly involve the Tribes, and (C) the Tribes have been divested of their sovereign power to tax." Pet. App. 6a.

First, the court held that the challenged taxes do concern tribal trust lands. Pet. App. 6a-10a. It concluded that the Tribes' interests in the lands underlying the rights of way were not extinguished by the Acts of 1887 and 1888, because those Acts gave petitioner's predecessor "only an easement, and not a fee." *Id.* at 8a (quoting *Great Northern Ry. v. United States*, 315 U.S. 262, 271 (1942)) ; see also Pet. App. 10a.

Second, the court held that the Tribes have a "significant interest in the subject matter" over which they have asserted taxing authority, Pet. App. 10a (quoting *Colville*, 447 U.S. at 153), since "[petitioner's] activities involve use of tribal lands and * * * [petitioner] is the recipient of tribal services," including "the intangible benefits of a civilized society, and the tangible benefits of police and fire protection." Pet. App. 10a (citation omitted). The court rejected petitioner's contention that its operations are not subject to tribal taxation because it has no "consensual relationship" with the Tribes and because its operations are controlled by state and federal, rather than tribal, authorities. "The relevant question," the court stated, "is * * * whether [petitioner] receives benefits from the Tribes for which it may be taxed. The answer to that question is yes." *Id.* at 11a. In the alternative, the court held that the relationship between petitioner and the Tribes is consensual in nature because it arose when "the Tribes consented to railroad rights of way by joining in * * * the agreement ratified by the Act of 1888 and [petitioner's predecessor] chose to run rail lines through the reservations by voluntarily applying for rights of way." *Id.* at 11a n.7.

Third, the court held that the Tribes have not been divested of their taxing authority, either by the legislation

creating their Reservations and granting the rights of way, or by the 4R Act. Pet. App. 11a-13a.⁵

DISCUSSION

The court of appeals correctly held that the Fort Peck and Blackfeet taxes are within the scope of tribal taxing authority recognized by this Court's decisions in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Contrary to the contentions of petitioner and its amici, *Merrion* and *Colville* are fully consistent with—and thus do not need to be “reconcil[ed]” with (Pet. 15)—*Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Neither *Montana* nor *Brendale*—which concerned tribal regulation of nonmembers' activities on fee lands—held that a consensual relationship must exist in order for an Indian tribe to exercise civil authority over nonmembers who conduct activities on Indian trust lands. And none of the four decisions suggests that this Court analyzes tribal tax laws under a framework different from the one used to analyze other types of civil law adopted by a tribe. We discern no tension among this Court's decisions nor any conflict among the lower courts on the question presented here. The petition for a writ of certiorari should therefore be denied.⁶

⁵ The court of appeals also rejected petitioner's contentions that the tribal taxes are barred by the provision in the 4R Act prohibiting discriminatory state taxes, Pet. App. 13a-14a, and by the Interstate Commerce Clause, *id.* at 14a-15a (discussing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190-193 (1989)). Petitioner does not renew those claims in this Court.

⁶ Although petitioner poses two questions at the outset of its petition (Pet. i), it discusses only the first question (whether tribal taxing authority over nonmembers depends on the existence of a consensual relationship) in the body of the petition. Petitioner does not discuss the second question (the effect, if any, that federal control over a taxpayer has on tribal taxing authority), although petitioner does claim that federal control is relevant to whether

1. This Court has long recognized that “the Indian tribes retain ‘attributes of sovereignty over both their members and their territory.’” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); see also *Williams v. Lee*, 358 U.S. 217, 223 (1959). The Court reaffirmed this very principle in two of the cases upon which petitioner chiefly relies. See *Montana v. United States*, 450 U.S. 544, 563 (1981) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). Among these attributes of sovereignty is the power of taxation. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985); *Merrion*, 455 U.S. at 137, 139; *Montana*, 450 U.S. at 565-566; *Colville*, 447 U.S. at 152-153; *Morris v. Hitchcock*, 194 U.S. 384, 391-392 (1904). Indeed, “[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion*, 455 U.S. at 137; see *Kerr-McGee*, 471 U.S. at 201.

Because tribal authority extends both to tribal members and to tribal territory, it is not limited to members of the tribe. See *Montana*, 450 U.S. at 565-566; *Cardin v. De La Cruz*, 671 F.2d 363, 366 & n.3 (9th Cir), cert. denied, 459 U.S. 967 (1982). It includes as well the “authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter.” *Colville*, 447 U.S. at 153; see also *ibid.* (“Except where Congress has provided otherwise th[e] power [to tax] may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.”) (quoting, with emphasis, *Powers of Indian Tribes*, 55 Interior Dec. 14, 46 (1934)). Although that authority may be “divested * * * by federal law or necessary implication of [a tribe’s] dependent status,” it is widely understood “that federal law to date has not

a consensual relationship exists. Pet. 17-18; see also Pet. Reply Br. 7. We address that claim at note 15, *infra*.

worked a divestiture of Indian taxing power." *Colville*, 447 U.S. at 152; see *Merrion*, 455 U.S. at 149-152.

This Court most recently addressed tribal authority to tax economic activity by nonmembers on tribal trust lands in *Merrion*.⁷ *Merrion* involved a challenge to a severance tax imposed by the Jicarilla Apache Tribe on oil and gas extracted from leased trust lands. 455 U.S. at 133, 135-136. In sustaining the tax, the Court declined to adopt the narrow view that tribal taxing authority is based solely on a tribe's power to exclude nonmembers from tribal land. Instead, the Court held that the taxing power "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Id.* at 137.⁸

The Court in *Merrion* relied to a significant extent on its earlier decision in *Colville*, which also upheld tribal authority to tax the activities of nonmembers on trust lands. In *Colville*, the Court reviewed an excise tax that the State of Washington imposed on cigarettes purchased by nonmembers on reservation trust lands. 447 U.S. at 141-142. Those purchases were also subject to tribal taxes. *Id.* at 144-145. Although the Court upheld the State's cigarette tax, it rejected the State's argument that the tribes lacked authority to impose their own cigarette taxes as well. The Court held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it

⁷ The Court's later decision in *Kerr-McGee* also concerned a tribal tax on nonmember activities on trust lands, but *Kerr-McGee* addressed only the question whether the tax had to be approved by the Secretary of the Interior. 471 U.S. at 198.

⁸ The Court in *Merrion* also held, in the alternative, that the severance tax was a valid exercise of the tribe's power to exclude the lessees. 455 U.S. at 144-148.

by federal law or necessary implication of their dependent status." *Id.* at 152.

2. In reviewing the Fort Peck and Blackfeet taxes, the court of appeals properly applied this Court's holdings in *Merrion* and *Colville*. The court concluded that the Fort Peck and Blackfeet taxes are permissible exercises of tribal authority because (1) the lands underlying petitioner's rights of way are tribal trust lands; (2) petitioner receives both tangible and intangible benefits from the Tribes in connection with its operations on the rights of way; and (3) federal law has not divested the Tribes of their taxing power.

Petitioner does not challenge any of these conclusions in this Court. Instead, although petitioner accepted the *Merrion* and *Colville* test below, it now contends that the language in *Merrion* and *Colville* upon which the court of appeals relied cannot be reconciled with *Montana* and *Brendale*. Specifically, petitioner argues that the latter two decisions establish that a tribe may tax a non-member's activities—even on trust lands—only if there is a consensual relationship between the tribe and the taxpayer. Pet. 9, 10-16; Pet. Reply Br. 5.⁹ A similar argument, however, was rejected in *Merrion*. Moreover, neither *Montana* nor *Brendale* adopted a consensual-relationship requirement for the exercise of tribal civil

⁹ In the court of appeals, petitioner initially acknowledged that a tribal tax on nonmember activities could be sustained on the basis of either a "consensual relationship" or a territorial nexus. Thus, petitioner's argument that a consensual relationship is necessary was based on its assertion that the Tribes retain no property interest in the lands underlying the rights of way. See 88-4429 Pet. C.A. Br. 20-21, 30, 32-34; 88-4429 Pet. C.A. Reply Br. 21-24; 88-4428 Pet. C.A. Br. 17-18, 26-27, 28-31; 88-4428 Pet. C.A. Reply Br. 21-24; see also, e.g., Br. in Support of Mot. for Prelim. Inj. in *Blackfeet* 34-38; Concluding Br. of the Pltf. in *Blackfeet* 25-26. The quite different argument that petitioner advances in this Court—that a "consensual relationship" is required for *any* exercise by a tribe of civil authority over nonmembers, regardless of whether a territorial nexus exists—was first squarely presented to the court of appeals only in petitioner's petition for rehearing and suggestion of rehearing en banc.

authority over nonmembers on trust lands. Finally, petitioner is wrong in asserting that the *Merrion/Colville* analysis of tribal tax laws differs from the *Montana/Brendale* analysis of other types of tribal civil laws.

a. The Court in *Merrion* rejected the argument that the scope of a tribe's taxing authority over its trust lands must be determined by the terms of any contractual or other consensual relationship between the taxpayer and the tribe. The taxpayer in *Merrion* had argued that the tribe could not tax oil and gas produced under its leases with the tribe because the tribe had not reserved the right to impose such a tax in the lease agreements. The Court rejected that argument because it "confuse[d] the Tribe's role as commercial partner with its role as sovereign." 455 U.S. at 145. The Court also rejected the related notion that "the power to tax depends on the consent of the taxed," concluding that consent "has little if any role in measuring the validity of an exercise of legitimate sovereign authority." *Id.* at 147.

Like the taxpayer in *Merrion*, petitioner confuses the Tribe's role as an entity capable of entering into commercial arrangements with its role as a sovereign. Petitioner asserts that a tribe may tax only those nonmembers with whom it has a "business relationship." Pet. 18. The Court in *Merrion* made clear, however, that a tribe's taxing power is not derived from commercial arrangements or "conditioned on the assent of [the] nonmember." 455 U.S. at 147.

b. To be sure, a consensual relationship is one form of "significant involv[ement]" (*Colville*, 447 U.S. at 152) that may support the exercise of a tribe's civil authority. That is the teaching of *Montana* and *Brendale*. Contrary to petitioner's contention (Pet. 8, 15-16), however, nothing in *Montana* or *Brendale* suggests that a consensual relationship is the exclusive basis for tribal regulation of nonmember activities on trust lands.

At issue in *Montana* was the authority of the Crow Tribe "to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-

Indians." 450 U.S. at 547. The Court "readily agree[d]" with the court of appeals' conclusion that the tribe could "prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." *Id.* at 557. The Court reached a different conclusion, however, with respect to the "power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." *Ibid.* The Court explained that, in light of the policy underlying the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751, by which certain reservation lands passed into fee status, "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." 450 U.S. at 560-561 n.9. The Court concluded that neither the Crow treaties nor the Tribe's inherent sovereignty was "so broad as to support the application of [the hunting and fishing regulation] to non-Indian lands." *Id.* at 563; see also *id.* at 559.

The Court in *Montana* emphasized, however, that even fee lands and non-Indian activities on such lands are not altogether immune from tribal regulation:

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-566 (citations omitted). This passage indicates that a "consensual relationship[]" may support the exercise of tribal authority "even on non-Indian fee lands." *Ibid.* The passage cannot be read, as petitioner would have it (Pet. 15), to mean that a consensual relationship is the *exclusive* basis for tribal authority over trust lands. Indeed, the Court made clear elsewhere in its opinion that a tribe's authority is broader over trust lands than over fee lands, 450 U.S. at 557, and the Court repeatedly stressed that its analysis and holding concerned the regulation of non-Indian activities on *fee* lands. *Id.* at 557, 563, 564, 565, 566; see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983).

Brendale likewise recognized a distinction between trust and fee lands. In *Brendale*, the Court held that the Yakima Nation had authority to regulate use of fee lands in the "closed" area of its reservation, but not those in the "open" area. Although a plurality would have held, relying on *Montana*, that the Yakima Nation lacked authority over fee lands in both areas, it distinguished *Colville* primarily on the ground that *Colville* "did not involve the regulation of fee lands, as did *Montana*." 492 U.S. at 427. Moreover, the plurality made clear that its approach did not affect "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members." *Ibid.* (quoting *Colville*, 447 U.S. at 152). Similarly, in his separate opinion, Justice Stevens took it as a given that the Yakima Nation "retain[ed] authority to regulate the use of trust land." 492 U.S. at 445.

c. Petitioner contends that *Merrion* and *Colville* have "cause[d] mischief" (Pet. Reply Br. 5) because they "suggest that tribal taxing authority" should be analyzed differently from "other exercises of sovereignty over non-members" (Pet. 9). That contention, however, rests on petitioner's erroneous view that, in analyzing non-tax laws, the Court in *Montana* and *Brendale* imposed a consensual-relationship requirement in all circumstances.

As explained above, neither *Montana* nor *Brendale* suggests that a consensual relationship is an absolute prerequisite for the exercise of tribal civil authority, especially on trust lands.

Moreover, petitioner is wrong in suggesting that *Merrion* and *Colville* reflect an approach to analyzing tribal tax laws that is different from the approach used in *Montana* and *Brendale* to analyze other types of tribal civil laws. In each of the four cases, the Court proceeded in a similar manner: It considered whether the tribe's inherent sovereignty or its power under treaties or other agreements with the United States provided a sufficient source of authority for the challenged law. The Court also inquired whether tribal powers were limited by legislation or divested by implication. *Brendale*, 492 U.S. at 422-432 (plurality opinion); *id.* at 441-447 (opinion of Stevens, J.); *id.* at 450-462 (opinion of Blackmun, J.); *Merrion*, 455 U.S. at 136-152; *Montana*, 450 U.S. at 557-566; *Colville*, 447 U.S. at 152-154. To be sure, under this approach, a tribe's authority to tax property and activities on trust lands may exceed its authority to impose other forms of regulation on fee lands. But that is merely a consequence of the historical and common-sense facts that Indian tribes have retained only some attributes of sovereignty (see *Montana*, 450 U.S. at 563); that Congress has limited certain tribal powers more than others (see *id.* at 557; *Colville*, 447 U.S. at 152); and that a tribe's nexus to a nonmember's activity may be stronger in some circumstances than in others. It is no basis for criticism that the validity of a tribal law may depend to a significant extent on the type and locus of regulation—*e.g.*, whether it is taxation or zoning, on trust or fee lands. Petitioner's attempt to obliterate the established distinction between Indian trust lands and non-Indian fee lands for these purposes ignores the "significant geographical component" of tribal sovereignty, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335 n.18 (quoting *White Mountain Apache Tribe*, 448 U.S. at 151), which embraces a tribe's "territory" as well as its "members." *Montana*, 450 U.S. at 563.

In sum, petitioner's criticism of the court of appeals' reliance on *Merrion* and *Colville* is misplaced.¹⁰ The Fort Peck and Blackfeet taxes fall well within the scope of tribal taxing power under *Merrion* and *Colville*. Furthermore, there is no conflict between *Merrion* and *Colville* on the one hand, and *Montana* and *Brendale* on the other.¹¹ The decisions are entirely compatible, for the latter involved fee lands. Together, these decisions com-

¹⁰ Petitioner also errs in criticizing the court of appeals for failing adequately to consider the extent of the Tribes' power to exclude it from their Reservations. Pet. 16 n.12. The court of appeals did not consider that issue because petitioner did not raise it. Petitioner therefore should not be permitted to raise it in this Court. See, e.g., *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

¹¹ Nor is there a "state of confusion," as petitioner asserts (Pet. 11; see also Pet. Reply Br. 6), among the lower courts on the question whether a tribe may tax nonmember activities on trust lands in the absence of a consensual relationship. Two decisions cited by petitioner (Pet. 11 n.8) are inapposite. In *Navajo Communications Co. v. Navajo Tax Comm'n*, 18 Indian L. Rep. 6068 (Navajo Sup. Ct. 1991), a taxpayer unsuccessfully argued that it had been granted a waiver from a tribal tax. In *Atchison, Topeka & Santa Fe Ry. v. Deputy Area Director*, 93 Interior Dec. 79 (Bd. Indian App. 1986), the taxpayer unsuccessfully challenged the BIA's approval of a tribal tax, arguing that the approval violated the Administrative Procedure Act, the Fifth and Fourteenth Amendments, the Interstate Commerce Clause, and the 4R Act. The other decisions cited by petitioner are consistent with the decision below. In *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1320-1323 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984), the court relied on *Merrion* to uphold a tribal license fee on reservation business activities. In *Conoco, Inc. v. Shoshone & Arapahoe Tribes*, 569 F. Supp. 801, 801-802, 806-807 (D. Wyo. 1983), the court relied on *Merrion* and *Colville* to uphold a tribal severance tax on oil and gas produced from leased tribal trust lands. Finally, in *In re Protest Filed by Railbox Co., et al.*, Tribal Ct. Nos. CV-87-54, CV-87-55 & CV-87-56 (Dec. 14, 1990), slip op. 9-12, the Tribal Council of the Pueblo of Acoma upheld an *ad valorem* tax on railroad cars that crossed its Reservation, concluding that the Pueblo retains a property interest in the land underlying the railroad and that a consensual relationship exists between the railroad company and the Pueblo.

pel rejection of petitioner's unduly restrictive view of tribal taxing authority over trust lands.¹²

3. As the court of appeals correctly held (Pet. App. 11a n.7), even if a "consensual relationship" were necessary to sustain the exercise of tribal taxing authority in a case such as this, that requirement is satisfied here.¹³ That alternative holding does not warrant review, because it was based on the specific facts, legislation, and executive agreement under which petitioner's predecessor obtained the rights of way across the Fort Peck and Blackfeet Reservations.

In any event, petitioner's challenge to the court's holding lacks merit. Petitioner asserts that the court erroneously relied on the fact that "100 years ago [petitioner's and the Tribes'] predecessors contracted independently with the same third party." Pet. 19.¹⁴ That assertion obscures the relevant facts. The "third party" to which petitioner refers was the United States, which was acting in its capacity as a trustee for the Tribes when it granted the rights of way. Moreover, the rights of way that petitioner's predecessor sought and obtained were consented to by the Tribes themselves in the agreement that Congress ratified in the 1888 Act. Finally, the 1887 Act providing for the right of way through what became the Fort Peck Reservation required that the railroad be

¹² This case presents no occasion for addressing petitioner's concern (Pet. 10, 28-29) that the Blackfeet tax might apply to some lands owned in fee by nonmembers. No fee lands are at issue in this case.

¹³ The district court made no finding on the issue whether a consensual relationship existed because in the district court, petitioner "concede[d] * * * the general power of the various Indian tribes to tax the transactions of non-Indians which occur on trust lands and significantly involve a tribe or its members." Pet. App. 20a. Petitioner primarily argued that its rights of way were not on trust lands. See, e.g., Br. in Support of Mot. for Prelim. Inj. in *Blackfeet* 14-19; Concluding Br. of the Pltf. in *Blackfeet* 19-23. Petitioner does not press that argument here.

¹⁴ The United States acted on behalf of the Tribes that are before the Court, not any tribal "predecessors."

operated "with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make," § 4, 24 Stat. 403, and the agreement ratified by the 1888 Act similarly provided that the railroad would be subject to "such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe," Art. VIII, 25 Stat. 115-116. Thus, by applying for rights of way pursuant to those enactments, petitioner's predecessor acknowledged the continuing interest of the Indians in the operation of the railroad across tribal trust lands, and voluntarily bound itself to an arrangement not only with the United States, but also with the Tribes.

Petitioner nonetheless asserts (Pet. Reply Br. 6 & n.6) that it is not in privity of contract with the Tribes. That assertion, even if correct, is irrelevant. This Court has never suggested that only a formal contract can create a "consensual relationship[]" sufficient to support tribal taxing authority. See *Montana*, 450 U.S. at 565. Indeed, petitioner itself recognizes that looser arrangements may qualify as "consensual relationships." See Pet. 14 (finding it "apparent" that nonmembers who voluntarily enter a reservation to buy cigarettes have entered into a "consensual relationship"). Thus, assuming *arguendo* that a consensual relationship provides the exclusive basis for tribal taxation of nonmembers, the absence of a formal contract between petitioner and the Tribes would not condemn the tribal taxes.¹⁵ In any event, for present pur-

¹⁵ Contrary to petitioner's contention (Pet. 9; see also Pet. 18, 24; Pet. Reply Br. 8), the fact that petitioner cannot move or abandon its rights of way without federal approval is likewise irrelevant to the existence of a consensual relationship. The non-member taxpayers in *Kerr-McGee* were similarly subject to "comprehensive [federal] regulations governing the operation of oil and gas leases." 471 U.S. at 199 (citing 25 C.F.R. Pt. 211 (1984)). Those regulations required the taxpayer-lessees to obtain federal approval before commencing or abandoning lease operations. See 25 C.F.R. 211.20, 211.27. The fact that the lessees were subject to extensive federal regulation did not affect the fact that their leases with the tribes constituted "consensual relationships." Petitioner itself acknowledges as much when it describes *Kerr-McGee* as in-

poses, the consensual relationship between petitioner's predecessor and the trustee (the United States), which acted on behalf of the beneficiaries (the Tribes), places petitioner in privity with the beneficiaries as well. *Cf. Nevada v. United States*, 463 U.S. 110, 135, 141-142 (1983).

4. Petitioner and its amici contend that the court of appeals erred in concluding that petitioner's operations "significantly involved" the Tribes and their members. Pet. 21; see also States Amicus Br. 14; Ass'n of American R.R. Amicus Br. 16 n.11. That contention does not warrant further review.

Contrary to petitioner's contention (Pet. 21), the court of appeals' conclusion was not based solely on the fact that petitioner operates, and therefore has a substantial physical presence, on trust lands. The court of appeals also relied on petitioner's receipt of tribal services, including "the intangible benefits of a civilized society, and the tangible benefits of police and fire protection." Pet. App. 10a (citation omitted). Compare *Cotton Petroleum*, 490 U.S. at 189-191. The court's analysis was thus faithful to the principle that tribes retain "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members." *Colville*, 447 U.S. at 152.

Moreover, petitioner understates the impact of its railroad operations on the Tribes and their members. Even with appropriate precautions, railroad operations are inherently dangerous. See, e.g., *Petition for Cert. in Burlington Northern R.R. v. Ford*, No. 91-779, Apps. E, F (argued Apr. 20, 1992) (88 accident claims by employees currently pending against Burlington Northern in Montana state courts alone). The trains that cross the Reservations travel at significant speeds and frequently carry hazardous materials. See *1991 Moody's Transportation Manual* 14 (product listing). Because of the potential for accidents to cause a release of hazardous materials, the

volving consensual relationships between the tribe and the taxpayer. Pet. 14-15.

Tribes are required to develop emergency response plans under the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 11001-11050. See 40 C.F.R. Pt. 355 (1991). In addition, other types of accidents and fires have occurred along petitioner's rights of way, requiring tribal expenditures for police and firefighting services. See CR 16 in *Fort Peck*, Exh. 11, ¶ 11; CR 8 in *Blackfeet*, Att. 1, ¶ 11.¹⁶

The tribal taxes at issue here reflect legitimate efforts by a government to defray the costs of services made necessary by a taxpayer's presence and activities within its jurisdiction. In this respect, the Tribes' taxes are, like the tax at issue in *Merrion*, similar to those imposed by "[n]umerous other governmental entities." 445 U.S. at 138. State taxes on the value of railroad property abound, having been upheld by this Court since the last century. See *Adams Express Co. v. Ohio*, 165 U.S. 194, 220 (1897); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *Thomson v. Pacific R.R.*, 76 U.S. (9 Wall.) 579 (1870). Montana, for example, levies an ad valorem property tax on railroad rights of way and other commercial property. Mont. Code Ann. §§ 15-6-101, 15-6-145 (1990). "Under these circumstances, there is nothing exceptional in requiring petitioner[] to contribute through taxes to the general cost of tribal government." *Merrion*, 445 U.S. at 137-138.

5. Petitioner (Pet. 22-30; Pet. Reply Br. 8-10) and its amici (see, e.g., Ass'n of American R.R. Br. 2, 4-8) advance several policy reasons why this Court should adopt a rule requiring that a consensual relationship exist before a tribe may tax nonmembers. Petitioner and its amici are particularly concerned about the potential for unrestricted and discriminatory taxation by tribes. With-

¹⁶ Petitioner reimburses the BIA, not the Tribes, for BIA's direct, out-of-pocket costs of fire suppression caused by the railroad. Contrary to petitioner's suggestion (Pet. Reply Br. 8 n.8), petitioner does not otherwise support tribal fire, police, or medical services, or the hazardous substance emergency planning that is made necessary, in part, by trains crossing reservation trust lands.

out minimizing the possible importance of that concern if tribal taxes (either alone or when added to state taxes) should prove unduly burdensome, it does not furnish a basis for further review here.

The courts below did not address whether the tribal taxes challenged here are excessive or discriminatory. Nor do we. The proper forum for presentation of such arguments is Congress, which, in passing the 4R Act, has prohibited imposition of certain discriminatory taxes by States, but not by Indian tribes. Congress alone is in a position to balance the interests of the tribes in raising revenues by taxing property and activities on trust lands against the impact such taxes might have on the maintenance of a national rail network. The Court should decline petitioner's attempt to circumvent the political process and to have the judiciary address its concerns indirectly—namely, by importing a novel and narrowly defined “consensual relationship” requirement into the body of law governing a tribe's sovereign authority over trust lands on its reservation. “If [petitioner] believes that the objectives of the [4R Act's nondiscrimination provision] are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress.” *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 692 (1992); cf. *Quill Corp. v. North Dakota*, No. 91-194 (May 26, 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

EDWARD J. SHAWAKER
VICKI L. PLAUT
Attorneys

MAY 1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JUN 2 1992

OFFICE OF THE CLERK

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESER-
VATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACK-
FEET TAX ADMINISTRATION DIVISION; EARL OLD PERSON,
CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIRMAN;
MARVIN WEATHERWAX, SECRETARY; ELOUISE C. COBELL,
TREASURER
and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE
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TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/
ACCOUNTANT,
Respondents.

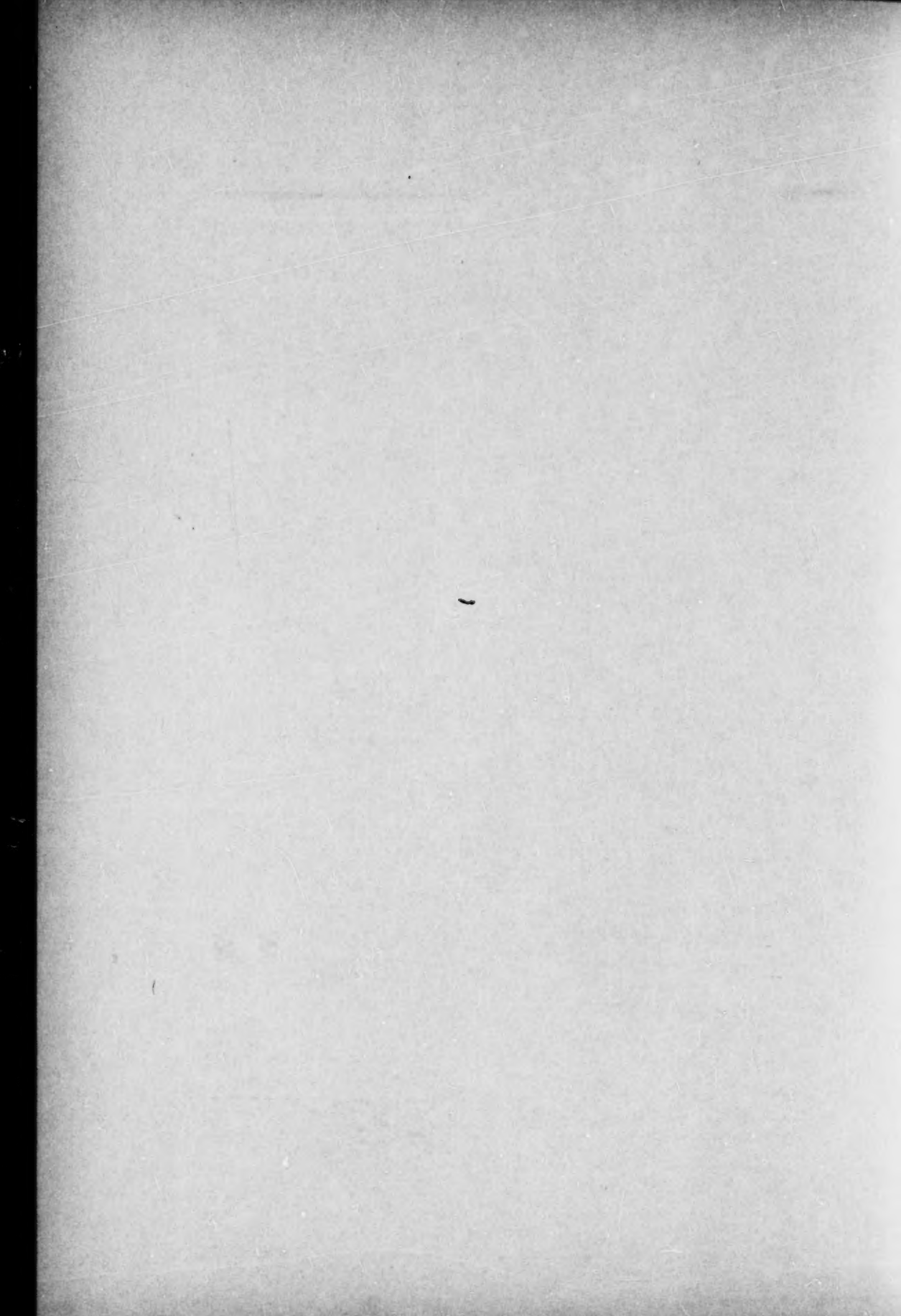
On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

Of Counsel:

EDMUND W. BURKE
THOMAS H. CATALANO
BURLINGTON NORTHERN
RAILROAD COMPANY
777 Main Street
Fort Worth, Texas 76102
MICHAEL E. WEBSTER
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P.O. Box 2529
Billings, Montana 59103-2529
June 2, 1992

BETTY JO CHRISTIAN
Counsel of Record
CHARLES G. COLE
MARK A. MORAN
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8113
Attorneys for Petitioner



RULE 29.1 STATEMENT

Burlington Northern, Inc. is the parent company of Petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of Petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western
Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
M T Properties, Inc.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
TTX Company
The Wichita Union Terminal Railway Company

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-545

BURLINGTON NORTHERN RAILROAD COMPANY,
v. *Petitioner,*

THE BLACKFEET TRIBE OF THE
BLACKFEET INDIAN RESERVATION *et al.,*
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITIONER'S SUPPLEMENTAL BRIEF

On December 2, 1991, this Court invited the United States to express its views as to whether review should be granted in this case. Six months later, the United States submitted a 21-page presentation of the position of the United States and its constituencies with respect to the merits. It is not a reasoned assessment of the cert-worthiness of the Petition. It should not dissuade this Court from granting review with respect to the important, difficult questions raised by this case.

Significantly, the brief submitted by the United States makes no effort to diminish the importance of the questions presented here. It tacitly accepts the many points made in the Petition and supporting briefs concerning the Ninth Circuit's decision:

- that the Ninth Circuit encompasses the majority of the Indian reservations in the country, and hence plays a pivotal role in the development of Indian law;
- that the nation's railroads have been subjected to tribal taxes in a variety of jurisdictions and have vast networks of track vulnerable to heavy tribal taxation;
- that a range of other utilities—including gas and oil pipelines, telephone lines, electricity lines—are now targets of tribal tax schemes, even though these utilities may cross tribal lands primarily to serve persons who are not members of the tribes and who do not even live within the boundaries of the reservation;
- that questions relating to the scope of tribal sovereignty over nonmembers are generating increasing tensions between Indians and non-Indians in the western states, and raising serious fiscal, regulatory and political problems for state governments.

The United States does not dispute these and the other points made in the original briefs with respect to the widespread ramifications of the decision below. In fact, the United States does not minimize the potential for excessive and discriminatory tribal taxation of nonmembers.¹ Thus, it is plain that the Petition presents issues of both real-life importance and national scope.

Rather than assessing the importance of the issues, the United States advocates a territorial theory of tribal sovereignty that assertedly controls the merits.² This is

¹ The United States would refer the problem of tribal taxation to Congress, even though it is a problem of judicial creation and a problem generated in part by doctrinal positions advocated by the United States.

² This territorial theory seems to rest on tiny snippets clipped from opinions identifying a "geographical component to tribal sovereignty." See, e.g., Brief for the United States at 8, 14 (quoting

not the first time that the United States has attempted to persuade this Court that the scope of tribal sovereignty over nonmembers should turn on one territorial boundary or another. Each time, this Court has rejected that view.

For example, in *Oliphant* the United States asserted that tribal sovereignty is virtually absolute within "the confines of a reservation where Indians maintain tribal relations." Brief for the United States as *Amicus Curiae* at 14, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729). The United States argued that, because "tribal jurisdiction is essentially territorial," *id.* at 15, it extends to all who enter the reservation, including non-Indians. "And this is so even though the conduct occurs on non-Indian land within a reservation." *Id.* at 15-16. Under the United States' view of tribal sovereignty, the status of nonmembers within the reservation "is no different from the situation of anyone residing in a foreign country." *Id.* at 45. This Court decisively rejected that view in *Oliphant*. See 435 U.S. at 208-09.

In *Montana*, this Court granted certiorari over the opposition of the United States, which had argued that the Ninth Circuit's decision created no conflicts and that there was no "call for review by this Court." Brief for the United States in Opposition at 8, *Montana v. United States*, 450 U.S. 544 (1981) (No. 79-1128). There the United States argued that the Crow Tribe should be

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 151 (1980)). These opinions deal with different subjects, and emphasize, in any event, that "there is no rigid rule" and that "the reservation boundary is not absolute." 448 U.S. at 142, 151.

The reliance of the United States on a territorial theory advanced in a decision dealing with state taxes is particularly puzzling when its brief fails to address the prior decisions of this Court holding that, for purposes of such state taxes, the railway rights of way granted by Congress "were taken out of the reservation by virtue of the grant" and are therefore subject to state tax. See Pet. Reply at 4 (quoting *Maricopa & P. R.R. v. Arizona*, 156 U.S. 347, 352 (1895)).

permitted to regulate the conduct of nonmembers within reservation boundaries, because *Oliphant* "holds only that Indian tribes cannot assert criminal jurisdiction over non-Indians." *Id.* at 13. The Court declined to accept this distinction and stated explicitly that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565.

In *Duro*, the United States again likened the status of a nonmember within reservation boundaries to that of a resident alien of a foreign country, "who must comply with the foreign country's criminal laws and subject himself to the jurisdiction of its courts, even though he cannot participate in its political processes." Brief for the United States as *Amicus Curiae* Supporting Respondents at 28, *Duro v. Reino*, 495 U.S. 676 (1990) (No. 88-6546). This Court again rejected the argument: "A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant* recognized that the tribes can no longer be described as sovereigns in this sense." *Duro*, 495 U.S. at 685.

This history indicates that the United States, as trustee for the tribes, has often championed a broad geographic view of tribal sovereignty. Employing that perspective, the United States finds the decision below desirable and urges this Court to leave it in place. But the position asserted by the United States has not been adopted by this Court. Before it becomes controlling law in the circuit whose decisions govern most tribal/nontribal relations in this country, it should be subjected to full briefing, argument and analysis.

In fact, the decisions of *this* Court suggest that simple geography does not alone control sensitive decisions with respect to the scope of tribal sovereignty over nonmembers. For example, in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980),

this Court referred to “the power to tax transactions occurring on trust lands *and significantly involving a tribe or its members.*” It did not suggest that *all* activities occurring on trust lands were subject to a sovereign tribal power to tax, and it did not even address a situation in which, as here, the tribe lacked a power to exclude the nonmembers sought to be taxed. To the contrary, as the United States acknowledges, *Colville* recognized taxing power over nonmembers “so far as such nonmembers may accept privileges of trade, residence, etc., *to which taxes may be attached as conditions.*” Brief for the United States at 8 (quoting 447 U.S. at 153) (emphasis added).³

The trust lands/fee lands distinction on which the United States relies is purportedly derived from this Court’s decision in *Montana*.⁴ But the Court did not there state a different rule for trust lands. It simply did not need to analyze the regulation of fishing and hunting on trust lands, because it agreed with the decision of the lower court upholding the application of the tribe’s regulations to nonmembers on trust lands as a condition of its power to exclude them. *See Montana*, 450 U.S. at 557,

³ As the United States acknowledges, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court was again faced with direct commercial dealings with a tribe, and therefore “relied to a significant extent on its earlier decision in *Colville.*” Brief for the United States at 9.

⁴ From the perspective of railroads and other utilities following a fixed route across the reservation, the trust lands/fee lands distinction is largely abstract. If the railroad crosses a portion of the trust lands at any point, the tribe will have an opportunity to exact a heavy tax. The illusory nature of the distinction is further illustrated by the fact that tribes are now considering *buying* fee lands adjacent to utilities and converting them into trust lands, in order to gain the right to impose a tax. *See* “Tribes May Buy Land to Collect More Taxes,” *Billings Gazette* (Nov. 15, 1991) (Eastern Montana Edition) (Fort Peck and Assiniboine Tribes considered buying fee land bordering on the Northern Border pipeline so as to impose taxes).

aff'g in part, 604 F.2d 1162 (9th Cir. 1979).⁵ In the absence of that power, if there is any authority over nonmembers at all, it must rest on the analysis presented by this Court in *Montana*, which relies on the existence of a consensual relationship.⁶

Admitting that a consensual relationship is "one form" of "significant involvement" under *Colville*, the United States asserts that there could be others. The United States does not describe, however, any other form of such involvement nor does it identify the decisions of this Court in which such nonconsensual relationships have been found adequate for tribal taxation or regulation of nonmembers.⁷

⁵ The United States is mistaken in suggesting that the taxpayers in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), were subject to the same restraints on their ability to quit the reservation as are the railroads. See Brief for the United States at 17 n.15. The regulation upon which the United States relies, 25 C.F.R. § 211.27, permits mineral lessees "to surrender a lease or any part of it" upon satisfaction of certain conditions essentially relating to the payment of outstanding rents and royalties and the conservation of the leased property. Railroads, on the other hand, are prohibited from abandoning a line unless they are able to convince the Interstate Commerce Commission that the abandonment is "consistent with public necessity and convenience." *Colorado v. United States*, 271 U.S. 153, 168 (1926); see 49 U.S.C. § 10903. No comparable substantive standard applies to the cancellation of tribal mineral leases.

⁶ Contrary to the Brief for the United States (at 9), the Court in *Merrion* did not dispense with the need for a consensual business relationship as a predicate for tribal taxation of nonmembers. Rather, it rejected the claim that a tax must be *specifically authorized* in the commercial agreement between the tribe and the outside entity before it may be imposed. Thus, *Merrion* exemplifies a situation in which taxes were upheld because nonmembers had "enter[ed] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Montana*, 450 U.S. at 565.

⁷ Contrary to the Brief for the United States (at 10 n.9), Petitioner has timely and firmly argued for the requirement of a consensual relationship. For example, in its Reply Brief in the Court

The United States argues, in the alternative, that the railroad *has* a consensual relationship with the tribes, because it received its statutory rights of way from the United States “which was acting in its capacity as a trustee for the Tribes when it granted the rights of way.” Brief for the United States at 16. This assertion is unsupported and is doubtful as a matter of history. But even assuming its validity, the government’s reasoning proves too much. For the fee lands now possessed by nonmembers were also granted by the United States, presumably in the same capacity. If this attenuated connection through the United States constituted the kind of consensual relationship contemplated by this Court in *Montana*, then the tribes would have plenary power to tax and regulate all nonmembers on fee lands—a view this Court has already rejected in *Montana* itself and in *Brendale*. Thus, the “third-party” theory of consensual relationship on which the United States and the court below have relied is both wrong and dangerous. It provides further reason to re-examine the decision below.

Finally, the United States relies on a static concept of tribal sovereignty—one which freezes the views expressed,

of Appeals, Petitioner emphasized “the critical importance of this missing element”:

[I]n every case cited by the Tribes in support of the Tribal power to tax, the entity being taxed had entered into some type of consensual relationship with the tribe, either through leases, or by engaging in other commercial activities involving the tribe or tribal members. . . . Here, however, this basic feature is absent, and its absence, in and of itself, distinguishes this case from all other cases cited by the Tribes in support of their general power to tax non-Indians.

. . . .

Here, because of the absence of this consensual relationship, it is clear that the railroad is not within the class of non-Indians identified in *Montana* over whom the Tribe can exercise its taxing power.

88-4428 Pet. C.A. Reply Br. at 12-14.

often in dicta, in the opinion in *Merrion*.⁸ This Court has provided new guidance in cases such as *Duro* and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), which receive little or no attention in the brief of the United States. In *Duro*—which the United States does not even cite—this Court emphasized consent as the basis for tribal jurisdiction over nonmembers. See 495 U.S. at 694. In *Brendale*, the plurality opinion by Justice White relied on the absence of a consensual relationship, even though the fee owners would undoubtedly enjoy many benefits from the tribal zoning plan. See 492 U.S. at 428. Justices Stevens and O'Connor continued to derive tribal power over nonmembers solely from the power to exclude. See *Brendale*, 492 U.S. at 433-37 (Stevens, J., concurring).⁹

⁸ *Merrion's* broad language has also misled the lower courts, which have indicated that they view this Court's tribal taxing cases as establishing an entirely separate branch of sovereignty jurisprudence. See Pet. at 10-11 & n.8. Thus, these courts have concluded that the power to tax is essentially an unlimited attribute of tribal sovereignty, which may be applied to *all* businesses located within reservation boundaries. For example, even railroad cars passing through the reservation have been held subject to an ad valorem tax. See *In re Protest Filed by Railbox Co.*, Nos. CV-87-54, 55 & 56, Pueblo of Acoma Tribal Court (Mar. 19, 1990), *aff'd*, Pueblo of Acoma Tribal Counsel (Dec. 14, 1990). Taxes have also been imposed on non-Indian businesses, presumably located on fee lands. See *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984). The United States now acknowledges that tribal tax laws should be analyzed under the same framework as "other types of civil law adopted by a tribe," Brief for the United States at 7, but it does not explain how these lower court cases can be reconciled with that principle. See *id.* at 15 n.11.

⁹ The United States asserts (Brief at 15 n.10) that this Court cannot consider the absence of any power to exclude because Petitioner did not raise it in the court of appeals. To the contrary, Petitioner argued in its Reply Brief below that the Tribes lacked the normal attributes of sovereignty over BN because "[t]he Tribes have conceded they have no power to exclude the railroad from the reservation." 88-4429, Pet. C.A. Reply Br. at 17.

Petitioner did not refer to the opinion of Justice Stevens in *Brendale*, because that case had not been decided at the time the

Clearly, these emerging, divergent views must be reconciled in order to provide definitive guidance for citizens, businesses, states and tribes who continue to struggle with fiscal and tax problems in tribal/nontribal relations.¹⁰ This case, with its well-defined facts and broad economic ramifications, provides an appropriate vehicle for that purpose. The United States has said nothing that detracts from that central point.

briefs were submitted. However, in its petition for rehearing in the court of appeals, Petitioner pointed out that, in *Brendale*, Justice Stevens, joined by Justice O'Connor, had relied solely on the power to exclude. Petitioner reasoned, "The Tribes clearly have no power to exclude BN from their reservations. . . . Thus, here, as in *Brendale*, the Tribes cannot rely upon their general power to exclude non-members as support for their taxing efforts." C.A. Pet. for Rehearing at 10 & n.1.

¹⁰ The Blackfeet Tribe has recently proposed new taxes on the distribution of gasoline and the provision of lodging that will apply to trust and fee land alike and to sales by nonmembers to other nonmembers. Proposed Blackfeet Gasoline Tax Ordinance, *to be codified at* Blackfeet Comprehensive Tax Code Ch. 6; Proposed Blackfeet Lodging Tax Ordinance, *to be codified at* Blackfeet Comprehensive Tax Code Ch. 7.

At the same time, litigation continues to spread. For example, *amicus* Reservation Telephone Cooperative has recently instituted a declaratory judgment action against the Three Affiliated Tribes of the Fort Berthold Reservation challenging those tribes' authority to impose a tax on the Cooperative's rights of way on both trust and fee lands in the absence of either a consensual relationship or a nexus between the tax and the activities sought to be taxed. *Reservation Telephone Cooperative v. Three Affiliated Tribes*, No. A1-92-111 (D.N.D. filed May 28, 1992).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

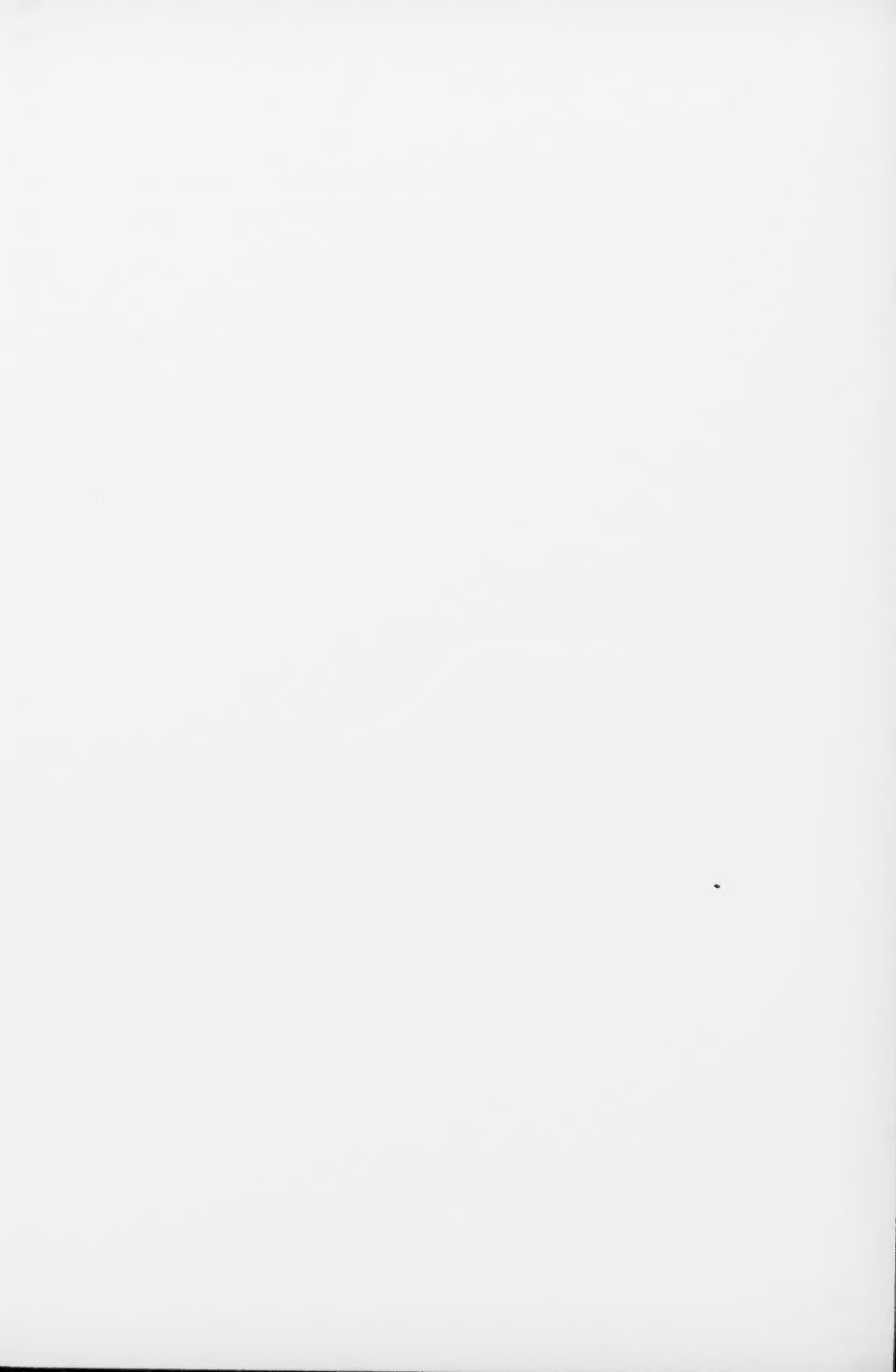
EDMUND W. BURKE
THOMAS H. CATALANO
BURLINGTON NORTHERN
RAILROAD COMPANY
777 Main Street
Fort Worth, Texas 76102
MICHAEL E. WEBSTER
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P.O. Box 2529
Billings, Montana 59103-2529

June 2, 1992

BETTY JO CHRISTIAN

Counsel of Record

CHARLES G. COLE
MARK A. MORAN
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8113
Attorneys for Petitioner



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TREASURER
and

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TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE
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On Petition for a Writ of Certiorari to the
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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF
AND SUPPLEMENTAL BRIEF OF THE STATES OF
CALIFORNIA, NORTH DAKOTA, SOUTH DAKOTA,
AND WASHINGTON AS AMICI CURIAE
IN SUPPORT OF PETITIONER

MARK BARNETT
Attorney General
LAWRENCE E. LONG *
Chief Deputy Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501
(605) 773-3215

* Counsel of Record

(Additional counsel listed on inside cover)

DANIEL E. LUNGREN
Attorney General
State of California
Department of Justice
1515 K Street, Suite 511
Sacramento, CA 95814
(916) 324-5437

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505
(701) 224-2210

KEN EIKENBERRY
Attorney General
415 General Administration
Bldg.
Mail Stop AX-02
Olympia, Washington 98504
(206) 753-5528

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MARVIN WEATHERWAX, SECRETARY; ELOISE C. COBELL,
TREASURER

and

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TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE
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AS AMICI CURIAE IN SUPPORT OF PETITIONER

Amici respectfully move for leave to file the attached Supplemental Brief of the States of California, North Dakota, South Dakota, Utah and Washington as *amicus curiae* in support of Petitioner. On October 31, 1991, *Amici* States filed their initial brief in support of Petitioner. On December 2, 1991, this Court invited the United States to express its views, and nearly six months later on May 28, 1992, the United States submitted a narrow and detailed response. The response of the United States goes more to the merits rather than to an assessment of the certworthiness of the Petition.

No State is a party in this litigation. Petitioner cannot be expected to bring a perspective to this Court that reflects the vital interests of *amici* States in this regard, though Petitioner has consented to the filing of this brief. For this reason, and to provide assistance to the Court not otherwise available, this motion and *amici* supplemental brief are submitted.

The majority of other States ordinarily interested in Federal Indian Law issues were not notified or requested to join in this motion or brief because of time restrictions.

Respectfully submitted,

MARK BARNETT
Attorney General
LAWRENCE E. LONG *
Chief Deputy Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501
(605) 773-3215
* Counsel of Record

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AS AMICI CURIAE IN SUPPORT OF PETITIONER

ARGUMENT

The primary concern that prompts the filing of this brief can be simply stated. The *amici* States are accustomed to the United States supporting expansive tribal jurisdictional claims. Thus they were not surprised by the position of the United States on the merits of this issue. However, in its response to the Court's order inviting its views, the United States fails even to address the special and important reasons for granting certiorari in this case. Grave social, political and economic problems are generated when tribal governments reach out to adopt taxation schemes deliberately designed to fall primarily on *non-members* of the tribe. Moreover, the Tribes are enacting such taxes on the erroneous assumption that they have the power to tax virtually every non-member interest in either trust or fee land that happens to fall within reservation boundaries. As a result, there exists today a legal controversy between the Tribes and non-members of unprecedented significance.

Instead of acknowledging the scope of this controversy, the United States advances a very narrow argument intended to demonstrate that in this case the Ninth Circuit has not unduly stretched this Court's narrow exception regarding tribal jurisdiction over non-members into a blanket rule in favor of jurisdiction, as it has sought to do in other cases for over a decade.¹ Apart from the fact that the argument of the United States falls short of even this limited objective, its Brief ignores too much.

This tribal taxing controversy has prompted burdensome litigation and bitter divisiveness. It has significantly impeded meaningful economic development on reservations. It is of vital concern to those who live or work in, on or near the reservations. In this light, to simply state that "no fee lands" are involved in this case, Brief

¹ Compare *Brendale v. Confederate Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428-29 (1989) (plurality opinion).

for the United States at 16 n.12, when the Blackfeet ordinance (like most others) specifically encompasses interests in fee lands, is not helpful. It obscures the reality of tribal taxation today on Indian reservations. Moreover, the *amicus curiae* briefs of the States of Montana, California, North Dakota, South Dakota, Utah, and Washington, the Association of American Railroads, and the Reservation Telephone Cooperative, all in support of the petition, attest that something more than just "petitioner's concern" (*id.*) is implicated here.

The United States should know the scope of the controversy because its constituent agencies have been active participants in the process. The precise extent to which those agencies have contributed to the problem by encouraging and approving such expansive tribal taxing ordinances is difficult to substantiate. But the driving force is clear. For example, as a recognized advocate of full territorial tribal sovereignty, the United States told the Court of Appeals in this case: "[E]ven *without* a direct property interest in the land . . . services, costs, and advantages provide an *independently sufficient nexus* for the tribal tax. . . ." ²

The broad position staked out by the United States in the court below and implemented in its administrative process helps explain why so much attention has focused on this case. In light of that position, a denial of this petition would be viewed as a signal to other Tribes to proceed with similar tax programs, thereby prolonging and expanding a divisive controversy.

The *amici* States have supported review of this case in this Court because their day-to-day experience reveals the corrosive effects of legal uncertainty on relationships between their non-Indian citizens and Indian tribes. It is always difficult to maintain constructive social, economic

² Brief for the United States at 11, *Burlington Northern Railroad v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991) (No. 88-4429) (emphasis added).

and political relations between a majority and a minority with special rights derived from lineage. It is particularly difficult, however, to avoid severe tensions when the rules are unclear with respect to the authority of the minority enclave over non-members lacking either a vote or a consensual relationship. And, within the range of actions that a minority government may take, hardly any power strikes at more sensitive nerves than the power to tax non-members and their businesses. Given the suspicions and fears that already infect relations between Indian tribes and their non-member neighbors, it is irresponsible to suggest that this fundamental issue be left for another case or another day.

This case will undoubtedly play a pivotal role in the development of Indian law. This past Term, in *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683 (1992), this Court delineated the authority of local governments to tax Indians on fee lands. This case involves the converse—the authority of tribal governments to tax non-members within the limits of Indian reservations. The issue here is not only equally important but, because it is a matter of federal common law rather than statutory in origin, this Court has a special obligation to address it. Indeed, in view of the absence of any other granted petitions dealing with Indian matters, this case provides a unique opportunity during the 1992 Term to clarify the basic doctrines left in conflict by the multiple opinions in *Brendale*.

Amici States can only surmise that the United States' broad geographic view of tribal sovereignty must be so strong and so entrenched to cause certiorari considerations that would otherwise be controlling to be virtually ignored by it. To be sure, the same tribal sovereignty argument, several years down the road, could be buttressed by recounting the substantial reliance that tribal governments would have placed on these new sources of additional revenues in the intervening years. But factors such as these should never be allowed to come into play.

The petition presents this Court with an issue of pure law ripe for resolution. *Amici* States respectfully submit that it should be authoritatively resolved now rather than later.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
State of California
Department of Justice
1515 K Street, Suite 511
Sacramento, CA 95814
(916) 324-5437

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505
(701) 224-2210

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MARK BARNETT
Attorney General
LAWRENCE E. LONG *
Chief Deputy Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501
(605) 773-3215

KEN EIKENBERRY
Attorney General
415 General Administration
Bldg.
Mail Stop AX-02
Olympia, Washington 98504
(206) 753-5528

* Counsel of Record